

1 KAREN A. OVERSTREET
2 Bankruptcy Judge
3 United States Courthouse
4 700 Stewart Street, Rm. 6301
5 Seattle, WA 98101-1271
6 (206) 370-5330

7
8
9
10 UNITED STATES BANKRUPTCY COURT
11 WESTERN DISTRICT OF WASHINGTON
12 AT SEATTLE

13 In re) Chapter 11
14 EVERGREEN CARDIOLOGY CARE)
15 CENTER, P.S.)
16)
17 Debtor.) Bankruptcy No. 04-20652
18)
19)
20)
21 BANNER BANK,)
22) Adversary No. A04-01377
23)
24 Plaintiff.)
25)
26 V.)
27 EVERGREEN CARDIOLOGY CARE)
28 CENTER, P.S., DENNIS ENOMOTO,)
and HANNAH LEAH ENOMOTO aka)
HANNAH LEAH MAHON,)
Defendants.)
29)
30)

MEMORANDUM DECISION¹

31 This matter came before the Court for trial commencing on
32 December 13, 2004, and continuing on various days until closing
33 argument on April 21, 2005. This is an action by Banner Bank
34 ("Banner Bank" or the "bank") to collect on one promissory note
35 executed by the debtor, Evergreen Cardiology Care Center, P.S.

36 _____
37 ¹ This disposition is not appropriate for publication and may
38 not be cited except when pertinent under the doctrine of law of the
case or the rules of res judicata, including issue and claim
preclusion.

39 Memorandum Decision - 1

1 ("Evergreen"), and on various guaranty agreements and/or notes
2 under which the bank claims Dennis Enomoto and/or Hannah Leah Mahon
3 Enomoto are liable as primary obligors or as guarantors of loans
4 made to their related entities, Century Stone Homes, Inc. ("Century
5 Inc."), Century Stone Ltd. ("Century Ltd."), CSH Systems
6 Technologies, LLC ("CSH"), and Evergreen. Dr. and Mrs. Enomoto and
7 their related entities will be referred to collectively hereinafter
8 as the "Enomoto Entities." The total amount sought by the Bank is
9 \$5,938,493 at default rates of interest under the loan documents.
10 The defendants request that certain of the notes at issue be
11 cancelled and they seek a monetary judgment against the bank for
12 approximately \$6.8 million, including punitive damages.

13 **I. JURISDICTION**

14 This court has jurisdiction of this matter pursuant to 28
15 U.S.C. § 1452, 28 U.S.C. § 1334, and 28 U.S.C. § 157.

16 **II. BACKGROUND**

17 A. The Parties and Related Entities.

18 Banner Bank is a Washington state bank which was formerly
19 known as Towne Bank. Dr. and Mrs. Enomoto are individuals who
20 reside in King County, Washington. Dr. Enomoto is a medical doctor
21 specializing in cardiology.

22 Mrs. Enomoto formed Century Ltd. in 1985. She has been the
23 sole owner and officer of that entity since its formation. Century
24 Ltd. was formed as a real estate holding company for the purpose of
25 holding the real property referred to in this litigation as The
26 Glen at Emerald Downs ("The Glen"). The Glen was a proposed two-
27 phase real estate development to construct 25 custom designed homes
28 based on "green" technology, using environmentally friendly

1 materials and technologies. With the purchase of the property
2 necessary for phase 2 of the Glen in 1997, Mrs. Enomoto testified
3 that she was intending to be ready to begin constructing homes in
4 2001 or 2002.

5 Century Inc. was also a corporation formed by Mrs. Enomoto to
6 participate in the development of The Glen as a joint venture
7 partner with Century Ltd. Century Inc. was the corporation that
8 was to obtain financing for the development of the project. Mrs.
9 Enomoto was the sole shareholder and officer of that entity at all
10 times relevant to this litigation.

11 At or around the end of 1998, Mrs. Enomoto formed CSH, a
12 limited liability company, for the purpose of carrying on the
13 business of Century Inc. According to Mrs. Enomoto's testimony,
14 Century Inc. had completed the construction of three demonstration
15 homes and CSH was to take over construction of the remaining homes
16 in The Glen development with financing provided from an industrial
17 revenue bond. Upon the formation of CSH, Century Inc. ceased its
18 operations. Although Mrs. Enomoto testified that at the time CSH
19 was formed, all of the assets and liabilities of Century Inc. were
20 transferred to CSH, no corporate documents showing those transfers
21 were introduced into evidence. Mrs. Enomoto's plan was also that
22 CSH would construct, own and operate a manufacturing facility that
23 would be used to construct pre-fabricated homes using green
24 technology. There is no evidence that a manufacturing facility was
25 ever constructed or that homes were constructed for The Glen, other
26 than the three demonstration homes.

27 Century Inc., Century Ltd. and CSH all shared the same office
28 and employees, and Mrs. Enomoto controlled all three entities.

1 In 1993, Dr. Enomoto incorporated Evergreen as a personal
2 services corporation for the purpose of conducting his cardiology
3 practice. Dr. Enomoto was the president and sole shareholder of
4 Evergreen at all times relevant to this litigation. Evergreen has
5 continued its business operations in chapter 11.

6 B. Procedural Background.

7 Banner Bank commenced this litigation against the defendants
8 in King County Superior Court. The defendants filed an answer and
9 asserted affirmative defenses and counterclaims. The action,
10 entitled Banner Bank v. Dennis Enomoto and Hannah Leah Mahon, aka
11 Hannah Leah Mahon Enomoto, and Evergreen Cardiology Care Center,
12 P.S., Cause No. 02-2-23502-6 SEA (the "State Court Case"), was
13 pending when Evergreen filed its petition under Chapter 11.
14 Evergreen removed this action pursuant to 28 U.S.C. 1452(a) by
15 filing its notice of removal on August 12, 2004.

16 The King County Superior Court had conducted significant
17 proceedings prior to removal of the action to this Court and had
18 entered an Order Granting Summary Judgment and Judgment Against
19 Evergreen Cardiology Care Center, P.S. on December 30, 2003 in
20 favor of Banner Bank (the "Summary Judgment").² In the Summary
21 Judgment, the superior court held that Banner Bank had a valid
22 claim against Evergreen under what is referred to as the "M Loan"
23 note (see page 11 *infra*) and that the note was secured by a valid
24 and enforceable security interest in virtually all of Evergreen's
25 assets. The state court entered judgment against Evergreen in the

27
28

² The Summary Judgment is attached to the Declaration of
Bruce Nelson filed in this adversary proceeding as docket No. 72.

1 amount of \$562,772.39.³ The Summary Judgment states that the
2 judgment amount is to accrue interest at 24% per annum. In the
3 Summary Judgment, however, the superior court ordered that
4 "Plaintiff is precluded from executing on this Judgment prior to an
5 Order of this Court that expressly lifts this preclusion or upon
6 final resolution of all remaining claims in this case." Summary
7 Judgment at p. 3, ¶ 2. In addition, an interlineation on page two
8 of the Summary Judgment states "This portion of this case appeared
9 to be a simple collection matter on a note which was not disputed
10 on grounds of authenticity." In proceedings before trial, this
11 Court held that the Summary Judgment is a final order entitled to
12 both *res judicata* and collateral estoppel effect in this
13 proceeding.⁴

14 Banner Bank claims that the defendants have breached
15 promissory notes and guaranties. The defendants have raised the
16 following defenses to Banner Bank's claims: ultra vires action by
17 the bank, satisfaction and release, forgery/unauthorized
18 signatures, undue influence, coercion/duress/business compulsion,
19 breach of fiduciary duty, dishonesty and deception, failure of
20 consideration, negligent account of monies owed, novation, fraud
21 and/or misrepresentation, estoppel, and violation of funds transfer
22 procedures under RCW 62A.4A-101 *et seq.*, including RCW 62A.4A-
23 201; 202; and 203. In addition to these defenses, the defendants
24

25 ³ This amount includes principal, interest and late charges
26 as of November 21, 2003 in the amount of \$551,456.37, plus
attorneys fees of \$10,816, and costs of \$500.00.

27 ⁴ The Court hereby incorporates herein by reference its prior
28 rulings on *res judicata* and collateral estoppel related to its
order of December 13, 2004 (Docket no. 131).

1 have made numerous counterclaims, including breach of contract,
2 breach of the duty of good faith and fair dealing, breach of
3 fiduciary duties, interference with business opportunities, fraud,
4 and equitable subordination, 11 U.S.C. § 510(c).

5 By order dated December 13, 2004, this Court held that the
6 defendants had no right to a jury trial and that Banner Bank has a
7 valid and perfected security interest in virtually all of the
8 assets of Evergreen, including without limitation, insurance
9 proceeds derived from the loss or destruction of Evergreen's
10 inventory, chattel paper, accounts, equipment and general
11 intangibles (the "Collateral").⁵

12 C. The Bankruptcy Proceeding.

13 Evergreen filed under Chapter 11 of the Bankruptcy Code on
14 August 12, 2004. No plan or disclosure statement has been filed in
15 Evergreen's case because its ability to reorganize depends upon
16 resolution of this adversary proceeding with Banner Bank. The
17 Court has authorized Evergreen to use Banner Bank's cash collateral
18 pursuant to numerous orders pending the outcome of this trial.

19 D. The Notes and Guaranties at Issue.

20 Banner Bank seeks to collect on eight loans owed by the
21 various defendants. The total amount of the bank's claim is
22

23 _____
24 ⁵ The order states that there was a question of fact
concerning whether all the insurance proceeds currently sought by
Evergreen from its insurance policy are attributable to the loss of
Banner Bank's Collateral. The Court held that it would be the
burden of Evergreen to prove at trial that some portion of the
proceeds of any insurance policy were not attributable to the loss
of the Collateral. At trial, however, counsel for Evergreen
conceded that any insurance proceeds would, in fact, be traceable
to the Collateral.

1 \$5,938,493 as of December 15, 2004, including default interest.

2 The eight loans at issue are described generally in this section.

3 1. The H Loan. What was referred to at trial as the "H Loan"
4 is memorialized by a Promissory Note dated as of July 19, 2001 in
5 the principal amount of \$496,775 (the "H Loan Note"). Ex. P-1-O.⁶
6 The loan number for the H Loan is #169013075 and the account number
7 is #100831. The H Loan Note appears to be signed by Mrs. Enomoto
8 as the President of the borrower, "Century Stone Homes
9 Corporation". Mrs. Enomoto testified at trial, however, that she
10 did not sign this note and believed it to be a forgery.

11 The H Loan Note states that it matured on September 30, 2001.
12 The bank contends that on the default date, which the bank claims
13 was October 1, 2001 (see Ex. P-30), the outstanding balance of the
14 note was \$496,775. With interest at the default rate of interest
15 (24%), the bank claims the total amount due as of December 15, 2004
16 was \$879,278. See Ex. P-30.

17 Banner Bank asserts that Mrs. Enomoto guarantied the H Loan
18 Note pursuant to a Commercial Guaranty dated October 17, 2000 and
19 which is in evidence as Exhibit P-11-O (the "10/17/00 Guaranty").
20 The 10/17/00 Guaranty references "Century Stone Homes Corporation"
21 as the borrower and Mrs. Enomoto as the guarantor. Towne Bank is
22 the referenced lender. The guaranty appears to be signed by Mrs.
23 Enomoto. At trial, she testified that the signature on the
24 10/17/00 Guaranty is hers, but that she did not recall signing the

25
26 ⁶ All exhibit references herein, unless otherwise noted, are
27 to exhibits admitted at trial. The notation "P" refers to
plaintiff's exhibits and the notation "D" refers to defendants'
exhibits. In addition, the notation of "O" after an exhibit number
28 references the original document admitted into evidence rather than
a copy.

1 guaranty. In addition, Mrs. Enomoto testified that she would not
2 have signed this guaranty in October of 2000 because, as of that
3 time, Century Inc. was no longer operating.

4 There is also a Continuing Guaranty Agreement dated August 20,
5 1996, in evidence as Ex. P-14b, which appears to be signed by both
6 Dr. and Mrs. Enomoto and which, by its terms, obligates them to
7 guaranty all loans made by Towne Bank to Century Inc. The
8 signatures of Dr. and Mrs. Enomoto on this agreement (the "8/20/96
9 Guaranty") were notarized. At trial, Dr. Enomoto testified that he
10 did not recall signing this guaranty agreement. Mrs. Enomoto did
11 not testify about this agreement.

12 Banner Bank contends that the H Loan is secured by collateral
13 pledged by Century Ltd. pursuant to a Commercial Security Agreement
14 dated July 19, 2001, in evidence as Ex. H-20 (the "H Loan Security
15 Agreement"). That agreement bears the signature of Mrs. Enomoto as
16 president of Century Ltd. and "Century Stone Homes Corporation."
17 At trial, Mrs. Enomoto testified that these signatures are
18 forgeries.

19 2. The J Loan. The J Loan, as it was referred to at trial,
20 is memorialized by a Promissory Note dated as of July 19, 2001 in
21 the original principal amount of \$600,000 (the "J Loan Note").
22 Ex. P-2-O. The loan number for the J Loan is 169030947 and the
23 account number is 100831. The J Loan Note appears to be signed by
24 Mrs. Enomoto as the President of the borrower, "Century Stone Homes
25 Corporation". Mrs. Enomoto testified at trial that the signature
26 on Ex. P-2-O is hers, but that she was only given page two of the
27 document and did not know what she was signing.

1 The J Loan Note states that it matured on September 30, 2001.
2 The bank contends that on the default date, which the bank claims
3 was October 1, 2001, the outstanding principal balance of the note
4 was \$599,934. With interest at the default rate (24%), the bank
5 claims the total amount due as of December 15, 2004 was \$1,061,867.
6 See Ex. P-30.

7 Banner Bank relies on the same guaranties described in the
8 preceding section (the 10/17/00 Guaranty and the 8/20/96 Guaranty)
9 to support its claim that Dr. and Mrs. Enomoto guaranteed the
10 indebtedness under the J Loan. The bank also relies on the 7/19/01
11 Security Agreement as the agreement by Century Ltd. to pledge
12 collateral in support of the J Loan.

13 3. The K Loan. The K Loan, as it was referred to at trial,
14 is evidenced by a Promissory Note dated July 19, 2001, with a
15 stated maturity date of September 30, 2001 (the "K Loan Note").
16 Ex. P-3-O. The note refers to Loan #169024577 and account #105622.
17 The original principal amount of the note is \$476,817.30, which the
18 bank contends was due on the default date of October 1, 2001. With
19 interest at the default rate of 24%, the bank's claim is \$843,953.
20 The K Loan Note bears the signature of Mrs. Enomoto as the Manager
21 of the borrower "CSH Systems Technologies, L.L.C." At trial,
22 Mrs. Enomoto testified that the signature on page two of the K Loan
23 Note is authentic, but she claims not to have seen page one of the
24 note when she signed it.

25 Exhibit P-12-O is the Commercial Guaranty dated April 10,
26 2001, which would evidence Mrs. Enomoto's personal guaranty of the
27 loans by the bank to CSH (the "4/10/01 CSH Guaranty"). Although
28 Mrs. Enomoto admitted that her signature appears on page two of the

1 guaranty, she testified that she did not recall signing the 4/10/01
2 CSH Guaranty nor when it might have been presented to her. There
3 is also a guaranty of CSH debt by Mrs. Enomoto in evidence as
4 Ex. P-14a. That guaranty, which is dated June 17, 1999 is signed
5 by Mrs. Enomoto (the "6/17/99 CSH Guaranty") and notarized as of
6 the same date. Mrs. Enomoto did not deny that her signature on
7 this guaranty was valid. There is no evidence that Dr. Enomoto
8 personally guarantied the K Loan.

9 In evidence as Ex. K-9 is a Deed of Trust dated June 17, 1999,
10 executed by the grantor, Century Ltd., in favor of Towne Bank, as
11 beneficiary, which pledges to Towne Bank an interest in property
12 commonly known as Marine View located in Pierce County, Washington.
13 The operative language of the Deed of Trust (hereinafter referred
14 to as the "Marine View Deed of Trust") states that it is to secure
15 all obligations of the borrower, CSH, under a note dated June 17,
16 1999 in the principal amount of \$328,844.48 and all renewals and
17 extensions of that note. The deed of trust was recorded in the
18 real property records of Pierce County on July 6, 1999 under
19 recording number 9907060124.

20 Mrs. Enomoto denied having executed the Marine View Deed of
21 Trust, although her signature on the deed of trust as President of
22 Century Ltd. is notarized as of June 17, 1999.

23 4. The L Loan. Banner Bank seeks to collect funds advanced
24 under the L Loan pursuant to a Promissory Note dated April 10,
25 2001, with a stated maturity date of October 11, 2001 in the
26 original principal amount of \$300,000 (the "L Loan Note"). This
27 note, the original of which is Ex. P-4-O, refers to the L Loan as
28 loan #169033057 and account #105622. According to the bank, the L

1 Loan Note was in default as of October 12, 2001 and principal in
2 the amount of \$239,931 was due. At the default interest rate of
3 24%, Banner Bank's total claim under the L Loan Note as of
4 December 15, 2004 was \$422,936.

5 The L Loan Note bears a signature of Mrs. Enomoto as the
6 Manager of CSH. Mrs. Enomoto testified that her signature appears
7 on the L Loan Note, but that she did not recall seeing page one of
8 the note.

9 The bank contends that the L Loan was guaranteed by
10 Mrs. Enomoto pursuant to the 4/10/01 CSH Guaranty and the 6/17/99
11 CSH Guaranty. There is no evidence that Dr. Enomoto guaranteed the
12 L Loan.

13 5. The M Loan. The M Loan is memorialized by a Promissory
14 Note dated December 19, 2001 with a maturity date of June 20, 2002
15 in the original principal amount of \$408,592.64 (the "M Loan
16 Note"). Ex. P-5-O. The borrower under the M Loan Note is the
17 debtor, Evergreen, and the note makes reference to loan #72000910
18 and account #E002971. Dr. Enomoto signed the note as the President
19 of Evergreen and there is no dispute that his valid signature
20 appears on the note. As noted above, the Superior Court granted
21 summary judgment on this note in the amount of \$562,772.39.
22 According to Ex. P-30, the bank claims that the total amount due
23 under the M Loan, with interest at 24% as of December 15, 2004, is
24 \$643,909.

25 The state court held that the M Loan Note is secured by a
26 valid and perfected security interest in the Collateral. The bank
27 submitted evidence of perfection of its security interest in Ex. P-
28 13a. Dr. and Mrs. Enomoto personally guaranteed the M Loan

1 pursuant to a Commercial Guaranty dated December 19, 2001 (the
2 "Evergreen Guaranty"). Ex. P-10-O. They do not contest their
3 signatures on the Evergreen Guaranty. Instead, they contend that
4 the M Loan was procured through fraud on the bank's part.
5 Recognizing that this Court held in prior proceedings that the
6 Summary Judgment of the state court as to the M Loan Note and
7 Collateral was *res judicata* in this proceeding, Evergreen seeks a
8 setoff against the amount of the state court judgment for damages
9 suffered by Evergreen on account of fraudulent conduct by the bank.
10 Evergreen also seeks to equitably subordinate the claim of Banner
11 Bank to unsecured creditors under Bankruptcy Code § 510(c).

12 6. The N Loan. The N Loan is a loan alleged to have been
13 made to Dr. and Mrs. Enomoto personally. The loan is evidenced by
14 a Promissory Note dated July 24, 2001 with a maturity date of
15 September 30, 2001 in the original principal amount of \$492,588.59
16 (the "N Loan Note"). The note makes reference to L
17 loan #169029287 and account #100836 and bears the signatures of
18 both Dr. and Mrs. Enomoto. Dr. Enomoto testified that the
19 signature on the note "probably" is his. Mrs. Enomoto testified
20 that although her signature appears on page 2 of the N Loan Note,
21 she did not sign the note.

22 According to Ex. P-30, the Enomotos defaulted under the N Loan
23 Note on October 1, 2001, at which time a balance in the amount of
24 \$492,589 was due. With interest at the default rate of 18%, Banner
25 Bank claims that \$777,049 was due as of December 15, 2004.

26 7. The O Loan. Banner Bank made the O Loan to Mrs. Enomoto
27 personally. The O Loan is evidenced by a Promissory Note dated
28 July 17, 2001 with a maturity date of September 30, 2001 and an

1 original principal balance of \$490,000 (the "O Loan Note"). Ex. P-
2 7-O. Exhibit P-30 reflects that, as of the alleged default date of
3 October 1, 2001, principal in the amount of \$487,614 was due under
4 the O Loan Note. With default interest at the rate of 18% to
5 December 15, 2004, the bank claims \$769,201 in total debt.

6 Mrs. Enomoto admitted at trial that she signed the O Loan Note
7 and that her signature on the note is valid. She contended in her
8 testimony, however, that the bank's loan officer, Rory O'Flaherty,
9 represented to her at the time she signed the note that the funds
10 advanced would be used to pay off in full all of the corporate debt
11 then owed by CSH, Century Inc. and Century Ltd. to the bank. This
12 defense is discussed below in Section IV.C.3 *infra*.

13 8. The P Loan. The P Loan is evidenced by an Executive Line
14 of Credit agreement dated August 8, 2000, the original of which is
15 in evidence as Ex. P-8-O (the "P Loan Agreement"). According to
16 the P Loan Agreement, the line of credit was available to
17 Dr. Enomoto up to a maximum credit limit of \$350,000 and was due
18 and payable in full on August 8, 2001. The agreement refers to
19 loan #169030244 and account #100836. The P Loan Agreement bears
20 the signature of Dr. Enomoto. In his testimony, Dr. Enomoto stated
21 that he believed the signature to be his; but because it was on a
22 page by itself, it could have been fraudulently attached to a
23 different document. At the same time, Dr. Enomoto testified that
24 he intended to take out the P Loan because he believed that the
25 proceeds of the loan would be used to pay off all indebtedness of
26 Evergreen as of August, 2000. Under the terms of the P Loan
27 Agreement, advances could be requested by telephone, by mail or in
28 person. As to telephone requests for advances, the agreement

Memorandum Decision - 13

1 states: "[Y]ou acknowledge and you agree that we do not accept
2 responsibility for the authenticity of telephone instructions and
3 that we will not be liable for any loss, expense, or cost arising
4 out of any telephone request, including any fraudulent or
5 unauthorized telephone request, when acting upon such instructions
6 believed to be genuine."

7 According to Ex. P-30, the bank claims that as of the default
8 date of August 9, 2001, the amount owed was \$336,926; and, with
9 default interest of 18% to December 15, 2004, the total amount due
10 was \$540,300.

11 E. The Defendants' Relationship With Banner Bank.

12 The defendants' banking relationship with Banner Bank, then
13 known as Towne Bank, commenced initially in 1996. Pursuant to a
14 Promissory Note dated August 20, 1996, Century Inc. and Century
15 Ltd. borrowed \$600,000 from Banner Bank to fund construction at The
16 Glen. Mrs. Enomoto testified that she had several loan proposals
17 at that time but she selected Banner Bank because of its expertise
18 with small businesses. The loan officer on this initial loan was
19 Rory O'Flaherty, who at that time was a senior loan officer. The
20 lending relationship grew as new loans were made to the various
21 Enomoto Entities and existing loans were renewed. Both Dr. and
22 Mrs. Enomoto testified that they relied on Rory O'Flaherty heavily
23 for advice about their lending options and that he exercised great
24 control over their loans and accounts. The evidence supports their
25 assertion that Mr. O'Flaherty was at that time an experienced loan
26 officer who was well liked both by bank personnel and his
27 customers.

28

Memorandum Decision - 14

1 Mr. O'Flaherty was the account officer for the Enomotos from
2 1996 to August of 2001. According to the testimony of Bruce
3 Nelson,⁷ a bank officer called by plaintiff, during that period of
4 time Mr. O'Flaherty served as an officer of the bank, a senior vice
5 president, a branch manager and a division manager with three
6 branches reporting to him. Mr. O'Flaherty had significant lending
7 authority and was also at various times a member of the bank's
8 senior loan committee. While Mr. O'Flaherty was acting as the
9 account officer for the Enomotos, he worked out of the Woodinville,
10 Washington branch.

11 Mrs. Enomoto testified that the purpose of the Banner Bank
12 loans to Century Ltd. and Century Inc. was to fund the various
13 construction phases of The Glen, but that she was intending to get
14 funding from an industrial revenue bond for the final phase of the
15 project and for the construction of a manufacturing facility. She
16 testified that near the end of 1998 and the beginning of 1999, a
17 revenue bond, which Mrs. Enomoto later testified was \$2 million,
18 was approved and that she formed CSH to use the bond to fund the
19 construction of a manufacturing facility to construct custom homes.
20 There are no documents in the record, however, evidencing the
21 existence or terms of this bond. While Mrs. Enomoto testified that
22 a bond had been "approved," she also testified that the bond
23 funding never came through because Banner Bank and Rory O'Flaherty
24 never provided her with the necessary bank statements that she
25 needed as part of her funding request. She also testified that in
26 the same time period, the bank loans to Century Inc. were "rolled

27
28 ⁷ At the time of trial, Mr. Nelson was a senior vice
president of Banner Bank and the manager of Special Credits.

1 over" to CSH because Century Inc. had ceased business and CSH was
2 to become the operating entity.

3 In 1999, Dr. Enomoto hired a new office manager for Evergreen
4 named Jan Thomas. At Evergreen, according to the testimony of
5 Dr. Enomoto, Thomas' specific duties included hiring, screening and
6 recruiting personnel, managing day-to-day operations, filling in at
7 the clinic front desk when needed, opening the mail and acting as
8 an interface with Evergreen's bookkeeper and accountant and with
9 Banner Bank. Although Ms. Thomas did not have authority to sign
10 agreements and documents for Evergreen or to make final decisions
11 on financial matters, she acted as an advisor to Evergreen and Dr.
12 Enomoto on these matters.

13 Around September or October of 2000, Mrs. Enomoto also hired
14 Jan Thomas to assist Mrs. Enomoto's companies in closing the
15 industrial revenue bond. From October of 2000 to July or August of
16 2001, Mrs. Enomoto testified that she was spending nearly all of
17 her time in Arizona working on The Glen project. During that time,
18 Dorothy Brumberg acted as the bookkeeper for Century Ltd. and CSH
19 and managed the Enomotos' personal accounts. During the same time,
20 Ms. Thomas worked on the bond and financing matters and with
21 contractors and others. Mrs. Enomoto testified that Ms. Thomas
22 gave her weekly oral or written reports of progress on the bond
23 financing and that Ms. Thomas met regularly with Mr. O'Flaherty to
24 discuss a detailed checklist and the scope of activities.

25 According to Mrs. Enomoto, Ms. Thomas was also directly
26 involved in the process by which the Enomotos would sign Banner
27 Bank loan documents. According to both Dr. and Mrs. Enomoto,
28 Mr. O'Flaherty would either send loan documents to Evergreen's

1 office or Ms. Thomas would pick the documents up from
2 Mr. O'Flaherty and take them to Evergreen. After the loan
3 documents were signed, Ms. Thomas would return them to
4 Mr. O'Flaherty at the bank. Mrs. Enomoto repeatedly described the
5 process of executing loan documents as a rushed process, whereby
6 numerous documents would be brought to Evergreen with instructions
7 that the Enomotos were to execute the documents quickly and get
8 them back to the bank. The Enomotos never kept copies of these
9 loan documents; instead, according to their testimony, they relied
10 on Mr. O'Flaherty to return "epistolis" copies of the documents
11 after their execution.⁸ Mrs. Enomoto testified that she was asked
12 to sign multiple copies of the same document and Mr. O'Flaherty was
13 to return a signed copy to them. Mrs. Enomoto never made any
14 written request of Mr. O'Flaherty, or anyone else at the bank, for
15 copies of loan documents or for the "epistolis" copies to which she
16 referred.

17 On cross-examination, Mrs. Enomoto was asked to refer to her
18 deposition transcript from December 1, 2004. Her deposition
19 testimony was somewhat different from her testimony at trial. At
20 deposition, Mrs. Enomoto testified that she signed numerous notes
21 and other loan documents that had not been completely filled in,
22 e.g., note dates and loan numbers were missing. Ex. P-19, pp. 82-
23 89. She also testified that Mr. O'Flaherty insisted that she sign
24 multiple signature pages to promissory notes and that she sign
25 promissory notes "in blank." *Id.* at p. 81, 82. Mrs. Enomoto also

26
27 ⁸ This Court can find no definition in Webster's dictionary
28 or any other source for the term "epistolis," a term Mrs. Enomoto
used repeatedly in her testimony. The Court can only assume that
she meant counterpart copies of some sort.

1 testified at her deposition that she had instructed Ms. Thomas to
2 make copies of every document leaving the office and that it was
3 Ms. Thomas' responsibility to make these copies. *Id.* at p. 87. At
4 trial, Mrs. Enomoto testified that she and her husband trusted
5 Mr. O'Flaherty so they just signed what he put in front of them.

6 On August 20, 2001, Judy Silvers, acting as the accountant for
7 CSH, sent Mr. O'Flaherty a letter regarding the financial
8 statements of the Enomoto Entities. Ms. Silver's letter is Ex. P-
9 32. According to the testimony of Mrs. Enomoto, Ms. Silvers was
10 working on a contract basis to try and reconcile different accounts
11 so CSH could close a new loan with American Home Loans. In the
12 letter Ms. Silvers reported that she was having considerable
13 difficulty reconciling the books and records and, in particular,
14 that the records concerning real estate purchases "had no clear
15 history or audit trail," "...proper trails were not established or
16 recorded between the three Companies & the Enomoto's in prior year
17 Financial Reports," and "[s]hareholder Loans due to/from each
18 company need to be audited to tie properly with Loans owed to
19 Banner Bank & actual amounts owed to Dr. & Mrs. Enomoto." Ex. P-
20 32, p. 1. Mrs. Enomoto testified that what Ms. Silver "meant" in
21 this letter was that she was missing the proper statements and
22 transaction reports for the various loans from Banner Bank, and
23 therefore she could not reconcile the intercompany transfers that
24 had been made by Mr. O'Flaherty. Nothing in the letter, however,
25 challenges the intercompany transfers, requests account statements
26 or transaction reports from Mr. O'Flaherty, or raises an issue
27 about the bank's calculation of the loan balances.
28

1 About the same time, the bank was learning some things about
2 Mr. O'Flaherty. Mr. Nelson testified that on the Thursday
3 preceding Labor Day weekend of 2001, he received a call from a
4 representative of Banner Bank's documentation division who wanted
5 to discuss two abnormal-appearing transactions. The transactions
6 involved the transfer of money from one entity to another unrelated
7 entity after which the transaction was reversed to make it look
8 like the transfer had never occurred. The loan officer implicated
9 in the transfer was Mr. O'Flaherty. Mr. Nelson contacted the
10 bank's legal counsel, Peter Goddu. Mr. Goddu and a bank auditor
11 initially confronted Mr. O'Flaherty on Friday, August 31, 2001, at
12 which meeting Mr. O'Flaherty referred to the questionable
13 transactions as "mistakes." See Proof of Loss Form, Declaration of
14 Mr. Goddu, Ex. D-23. Mr. Goddu, Mr. Nelson and others, however,
15 continued investigating these transactions over the Labor Day
16 weekend after meeting on Saturday, September 1, 2001. Other
17 questionable transactions were discovered, at least one of which
18 related to the Enomotos. On Sunday, September 2, 2001,
19 Mr. O'Flaherty initiated a meeting with Mr. Goddu in which
20 Mr. O'Flaherty admitted his wrongdoing. *Id.* and testimony of Peter
21 Goddu. Mr. O'Flaherty resigned after Labor Day weekend 2001.

22 Phil Corneil, another Banner Bank loan officer, took over the
23 Enomotos' accounts after Mr. O'Flaherty's resignation. Like
24 Mr. O'Flaherty, Mr. Corneil was a senior vice president at Banner
25 Bank and a branch manager. Mr. Corneil and Mr. Nelson met with Dr.
26 and Mrs. Enomoto and Jan Thomas on September 21, 2001. According
27 to Mr. Nelson's testimony, they explained to the Enomotos that Mr.
28 O'Flaherty was no longer at the bank and that Mr. Corneil would be

1 taking over their accounts. The Enomotos were advised that
2 although Mr. O'Flaherty had apparently allowed many overdrafts on
3 the Enomotos' accounts to occur, those overdrafts would no longer
4 be allowed by the bank. The Enomotos advised that they wanted
5 another \$1.7 million in order to continue development efforts at
6 The Glen, but they were advised that the bank would not extend any
7 new loans to them. Although the Enomotos inquired about the
8 balance of their loan accounts, Mr. Nelson did not recall any
9 account-by-account discussion at this meeting. He testified that
10 the Enomotos were told that the loans were all cross-defaulted and
11 that the bank had the right to call all the loans and pursue all of
12 its remedies. He recalled that the Enomotos also raised questions
13 about the Evergreen loan and they discussed Evergreen's cash flow,
14 deposits to the bank control account and additional cash needs.
15 According to Mr. Nelson, neither Dr. nor Mrs. Enomoto, nor Ms.
16 Thomas, told them at the meeting that they had not been getting
17 their loan and account statements regularly. Dr. Enomoto stated
18 only that he thought some of the information they received was not
19 accurate, and Mr. Corneil agreed to provide them with any
20 information they needed. Mr. Corneil requested a plan from the
21 Enomotos as to how their loans were going to be repaid.

22 Mr. Nelson's notes from the September 21 meeting are Ex. D-14.
23 These notes reflect that the Enomotos raised some concerns about
24 the amount of their outstanding loans and argued that the bank
25 needed to honor the commitments Mr. O'Flaherty had made to them
26 regarding their real estate development project. Mr. Nelson's
27 notes indicate that the Enomotos were advised that the bank could
28 not justify their loans and that Dr. Enomoto responded that they

1 needed more time to find other financing. The notes also reflect
2 that Ms. Thomas claimed to have six uncashed cashier's checks
3 totaling \$41,655 that could be voided to free up additional dollars
4 that were needed to fund current expenses. She noted that she was
5 not sure on which accounts these checks had been written.

6 Mrs. Enomoto testified that at the September 21 meeting, she
7 and her husband expressed surprise at the claim that the bank's
8 loans exceeded \$3 million, and that they questioned whether loans
9 had been properly paid off and whether balances on notes rolled
10 over were correct. She said she believed the loans totaled only
11 about \$900,000. She testified that she told Mr. Corneil and Mr.
12 Nelson that because of the rolling-over of the notes, the balances
13 were hard to track and she wanted information about the loan
14 balances. She testified that Mr. Corneil and Mr. Nelson did not
15 provide her with information substantiating the loan balances after
16 the meeting.

17 Mr. Corneil's recollection of the September 21 meeting was
18 largely the same as Mr. Nelson's. The biggest concern he expressed
19 at the meeting was that the Enomotos were making deposits into the
20 bank control account only twice a month and were incurring
21 significant and unnecessary overdraft fees as a result. He
22 advocated for more frequent deposits into the bank control account
23 to avoid these fees. He did not recall the Enomotos expressing
24 surprise over the loan balances or telling him they had not been
25 receiving their loan and account statements on a regular basis.
26 Mr. Corneil admitted, however, that the Enomotos did ask for some
27 copies of statements, loan history transaction detail and copies of
28 promissory notes. These were provided to the Enomotos after the

1 meeting. Mr. Corneil further testified that the Enomotos never
2 expressed any concerns about this information and never notified
3 him in writing that they disputed the loan balances until the
4 litigation was commenced by the bank. Mr. Corneil left the meeting
5 believing that he would receive from the Enomotos a formal plan
6 detailing how they would repay the loans; however, he never
7 received such a plan. Instead, he received only assurances that
8 the Enomotos were seeking financing from other lending sources.⁹

9 As of the time of the September 21 meeting, both Mr. Nelson
10 and Mr. Corneil knew of the investigation of Mr. O'Flaherty and
11 knew that at least two of the questionable transactions involved
12 accounts of the Enomotos.¹⁰ On the instructions of bank management,
13 however, neither Mr. Nelson nor Mr. Corneil disclosed any of this
14 information to the Enomotos. Mr. Nelson testified that, based upon
15 his investigation, as of the date of the meeting the transactions
16 that pertained to the Enomotos' accounts had been reversed with no
17 damage to them. He therefore did not feel it was necessary to
18 disclose the transactions to them.

19 On September 26, 2001, the bank hired RSM McGladrey, Inc.
20 ("RSM"), an independent accounting and auditing company, to
21 investigate Mr. O'Flaherty's "kiting" and "irregular" activities.
22 The next day, September 27, 2001, Mr. Goddu issued a default letter
23
24

25 ⁹ The bank offered into evidence Ex. P-41, P-42 and P-43,
26 written communications from Mrs. Enomoto to Mr. Corneil after the
September 21, 2001 meeting.

27 ¹⁰ Mr. Nelson testified that as of the time of the meeting, he
28 was aware of two questionable transactions involving the Enomoto
accounts.

1 to the Enomotos and their related companies. The letter identified
2 the following defaults under the Enomoto loans:

- 3 1. The P Loan (line of credit to Dr. Enomoto) matured on
4 August 8, 2001 and was due and payable in full.
- 5 2. The N Loan (personal loan to Dr. and Mrs. Enomoto) would
6 mature on September 30, 2001 and payments were more than
7 20 days past due.
- 8 3. The O Loan (to Mrs. Enomoto) would mature on
9 September 30, 2001 and the default under the N Loan
10 constituted a default under the O Loan.
- 11 4. The K Loan (to CSH), guarantied by Mrs. Enomoto, was in
12 default because of delinquent interest payments more than
13 20 days past due.
- 14 5. The L Loan (to CSH), guarantied by Mrs. Enomoto, was
15 declared in default because of the default under the K
16 Loan.
- 17 6. The H Loan (to Century Inc.), guarantied by Dr. and Mrs.
18 Enomoto, was in default because of interest payments more
19 than 20 days past due.
- 20 7. The J Loan (to Century Inc.), guarantied by Mrs. Enomoto,
21 was in default because of interest payments more than 20
22 days past due.
- 23 8. Loan number 169030236 (a predecessor to the M Loan to
24 Evergreen), guarantied by Dr. and Mrs. Enomoto, was not
25 declared in default; but notice was given that if the
26 Enomotos failed to honor their guaranties on the other
27 loans, such failure would constitute a default under this
28 loan.
- 29 9. Loan number 169013067 (a predecessor to the M Loan to
30 Evergreen), guarantied by Dr. and Mrs. Enomoto, was not
31 declared in default, but notice was given that if the
32 Enomotos failed to honor their guaranties on the other
33 loans, such failure would constitute a default under this
34 loan.

35 Ex. D-118. The letter concluded with a demand for a total amount
36 of \$3,649,220, consisting of \$3,591,721.78 in principal, \$52,093.24
37 in interest, and \$5,404.80 in late charges. Even though the letter
38 did not declare Loan numbers 169030236 and 169013067 in immediate
39

1 default, the total amount claimed includes \$412,207.38 attributable
2 to those two loans.

3 There is no evidence of any written response by the Enomotos
4 to Mr. Goddu's demand letter of September 27, 2001. Mrs. Enomoto
5 testified that she asked her employee, Debby Gallaher, to try to
6 "make sense of the letter," but she did not believe they were in
7 default at the time of the letter. The next written communication
8 between the parties appears to be an October 18, 2001 "to whom it
9 may concern" letter created by Mr. Corneil at Mrs. Enomoto's
10 request. Mrs. Enomoto obtained a credit report in connection with
11 a loan from another lender she was seeking and she discovered one
12 or two "30-days late" references to Banner Bank loans. Mrs.
13 Enomoto contacted Mr. Corneil and asked him to check the bank's
14 records. In his October 18 letter, which is Ex. D-8, Mr. Corneil
15 notes that the bank had "apparently" reported the Enomotos' loans
16 as "delinquent on several occasions," but then goes on to say that
17 the bank's experience with the Enomotos had been "favorable" and
18 that "the delinquencies reported were due entirely to an error on
19 our [the bank's] part." The letter concludes, "In fact, these
20 loans should not have been reported to our credit agency as they
21 are business loans." The re line to the letter, however, refers
22 only to the N Loan, which was declared in default in Mr. Goddu's
23 September 27, 2001 letter and Loan number 169022274, which was a
24 predecessor loan to the P Loan and was not mentioned in Mr. Goddu's
25 demand letter. Mrs. Enomoto testified that after receiving the
26 letter she was perplexed as she had not been notified of any errors
27 related to the loans. Mr. Corneil testified that he prepared the
28 letter at the request of Mrs. Enomoto, who contacted him to say she

1 was working on alternative sources of financing and needed to
2 clarify some issues on her credit report that indicated identity
3 theft. Mr. Corneil testified that the letter referred to a period
4 four to six months earlier when the loans were not in default.

5 Mrs. Enomoto testified that at the time of her November 14,
6 2001 fax to Mr. Corneil, Ex. P-42, she suspected that something
7 might "not be right" with Ms. Thomas, because of Ms. Thomas'
8 failure to provide documents that Mrs. Enomoto had requested. On
9 November 19, 2001, RSM issued a report of its investigation of Mr.
10 O'Flaherty's activities at the bank. The report is Ex D-111. The
11 report describes the investigation conducted by RSM and its
12 findings. The RSM report confirms Mr. O'Flaherty's creation of
13 fictitious transactions, his manipulations of customer accounts,
14 his creation of a false tax return for a customer and his
15 participation in a check kiting scheme by a bank customer. The
16 report describes the typical account manipulation by Mr. O'Flaherty
17 as follows:

18 Each manipulation involved posting a loan advance to a
19 borrower's account with the offsetting entry to another
customer's overdrawn deposit or past due loan account.
20 The effect of this transaction was a temporary fix to
bring a customer's deposit account positive or loan
balance current.
21

22 Ex. D-111, p.2. One of RSM's findings is that some of the
23 transactions went unchallenged even though other employees at the
24 bank knew of them, because "they all [these other bank employees]
25 also stated they had the utmost confidence in Mr. O'Flaherty." Ex.
26 D-111, p. 4. RSM concluded that:

27 All false entries were subsequently reversed and the
28 borrowers made "whole." No direct dollar loss was
sustained as a result of the fictitious transactions.

Memorandum Decision - 25

1
2 Ex. D-111, p.2. Ms. Didi Howe, the director of RSM's risk
3 management group, testified extensively at trial about the report.
4 She worked directly on the investigation that led to the issuance
5 of the RSM report.¹¹

6 A month later, in December of 2001, Mrs. Enomoto retained
7 Toyer & Associates, a forensic accounting firm, to investigate not
8 only the Banner Bank transactions but also potential employee
9 dishonesty claims involving Ms. Thomas and other employees. In
10 January of 2002, Ms. Thomas was fired from her positions with all
11 of the Enomoto entities for suspected fraud, embezzlement and
12 malfeasance. Exhibit P-23 is Evergreen's May 20, 2002 report for
13 insurance purposes of the business losses attributable to
14 fraudulent conduct by one or more of Evergreen's employees,
15 including Ms. Thomas. In addition, Ex. P-24 is a letter prepared
16 by counsel for Evergreen which identifies nearly \$600,000 in losses
17 suffered by Evergreen as a result of employee misconduct. The
18 letter describes numerous fraudulent employee schemes, most of
19 which implicate Ms. Thomas in some way and which involve many of
20 Evergreen's employees previous to Jan Thomas. The letter describes
21 seven fraudulent schemes: office expense fraud, payroll/timesheet
22 fraud, medical/dental benefit fraud, accounts receivable fraud and
23 loan/banking manipulations. The letter describes how Jan Thomas,
24 with her extensive control of Evergreen's finances and financial
25 information, could perpetrate these various frauds on Evergreen.

26
27 ¹¹ The notes of Ms. Howe's separate meetings with Bruce Nelson
28 and Phil Corniel on September 28, 2001, at which she obtained
background material about the bank's internal investigation, are in
evidence as Ex. D-146.

1 The letter asserts that Evergreen is entitled to in excess of
2 \$500,000 under the insurance policy, including audit costs.¹²

3 Mrs. Enomoto testified extensively about how she believed Ms.
4 Thomas had perpetrated the same kind of fraudulent schemes as those
5 described in Ex. P-24 against her companies. Mrs. Enomoto
6 testified that Ms. Thomas and Mr. O'Flaherty were collaborating to
7 embezzle hundreds of thousands of dollars from Century Inc. and
8 CSH.

About a month after Ex. P-24 was faxed to Evergreen's insurance company, Banner Bank commenced its litigation against the defendants. At that point the Enomoto accounts were transferred to Bruce Nelson the Senior Vice President and Manager of Special Credits. On May 23, 2003, the Federal Deposit Insurance Corporation issued an Order of Prohibition From Further Participation (FDIC-03-007e) with regard to Mr. O'Flaherty, finding that he had engaged in "violations, unsafe or unsound banking practices, and/or breaches of fiduciary duty" with respect to Banner Bank and that he would be prohibited from, *inter alia*, "participating in any manner in the conduct of the affairs of any financial institution or organization enumerated in section 8(e)(7)(A) of the Act, 12 U.S.C. § 1818(e)(7)(A)." Ex. D-3. Neither Mr. O'Flaherty nor Ms. Thomas testified at trial.

III. ISSUES

24 The issues in the case are (i) whether Banner Bank is entitled
25 to judgment for amounts due under the various notes and guaranties
26 described above and, if so, for what amount; and (ii) whether the

²⁸ ¹² The letter implies wrongdoing by a long list of former Evergreen employees over a prolonged period.

defendants are entitled to offset any amount due or are entitled to affirmative relief against Banner Bank.

IV. DISCUSSION

4 || A. Forgery.

Based upon the testimony of Dr. and Mrs. Enomoto, the only uncontested signatures are as follows:

- 7 ● Mrs. Enomoto admits signing the Evergreen Guaranty and
8 the O Loan Note, but she denies she signed any of the
9 other loan documents at issue. She claims that either
10 her signature on these other documents is a forgery or
11 that she signed only a signature page that was
12 fraudulently attached to another document.

13 ● Dr. Enomoto admits that he signed the M Loan documents,
14 including the M Loan Note, the security agreement and the
15 Evergreen Guaranty. He either did not recall signing the
16 rest of the documents bearing his name or he claims that
17 he signed a signature page that was fraudulently attached
18 to another document.

For illustrative purposes, Mrs. Enomoto created a chart that was admitted as Ex. D-148A. The chart shows the progression of each loan through a series of loan documents. Mrs. Enomoto admits signing only the documents that are depicted in green boxes with solid green borders. According to the chart, Mrs. Enomoto admits that she signed the original note that created the \$600,000 loan to Century Inc. and Century Ltd. in 1996, but after that point she never signed another loan document related to that loan. Mrs. Enomoto denies that any authentic signature appears on any document related to the J Loan, the K Loan, the L Loan and the N Loan.¹³

27 ¹³ Dr. and Mrs. Enomoto claim that the M Loan, the O Loan and
28 the P Loan were each procured through fraud on the bank's part
through its agent Rory O'Flaherty. See Section IV.C *infra*.

1 Under Washington law, the relevant provision governing forged
2 signatures, or validity of signatures in the statute's terminology,
3 is RCW 62A.3-308(a) which provides:

4 In an action with respect to an instrument, the
5 authenticity of, and authority to make, each
6 signature on the instrument is admitted unless
7 specifically denied in the pleadings. If the
8 validity of a signature is denied in the
pleadings, the burden of establishing validity
is on the person claiming validity, but the
signature is presumed to be authentic and
authorized....

9 (Emphasis added).¹⁴ Because of the presumption, the plaintiff is
10 only required to meet its burden after the defendant has introduced
11 some evidence "which would support a finding that the signature is
12 forged or unauthorized." RCW 62A.3-308(a) Official Comment 1.

13 There is no Washington case law indicating how much evidence
14 is sufficient to rebut the presumption of authenticity. The
15 official comments to the statute, however, provide that "[t]he
16 defendant's evidence need not be sufficient to require a directed
17 verdict, but it must be enough to support the denial by permitting
18 a finding in the defendant's favor." RCW 62A.3-308(a) Official
19 Comment 1.

20 Courts in other jurisdictions differ as to what evidence is
21 sufficient to rebut the presumption. For example, in *First Nat.
22 Bank in Marlinton v. Blackhurst*, 345 S.E. 2d 567, 572 (W.Va.
23 1986) (language of local UCC provision similar to RCW 62A.3-308(a)),
24 the court ruled that "a mere denial of the signature's genuineness
25 [was] insufficient," but "a denial along with a sample of [the]

26
27

¹⁴ RCW 62A.1-201(43) defines "unauthorized" signature as "one
28 made without actual, implied or apparent authority and includes a
forgery."

1 true signature" was sufficient to rebut the presumption. In
2 contrast, in *Triffin v. Somerset Valley Bank*, 777 A.2d 993, 1001
3 (N.J. Super. A.D. 2001) (language of local UCC provision similar to
4 RCW 62A.3-308(a)), the court ruled that it was insufficient to rely
5 on "self-interested and conclusory statements" to "disprove the
6 authenticity of the signature."

7 Neither party in this case called a handwriting expert.
8 Therefore, the Court must make findings of fact on the authenticity
9 of the signatures at issue without the benefit of expert testimony.
10 The bank relies on the fact that the loan documents were produced
11 from its ordinary business records. Dr. and Mrs. Enomoto supplied
12 only their own testimony denying their signatures or claiming that
13 they did not intend for pages they signed to be attached to
14 particular loan documents. This Court concludes that the Enomotos
15 did not meet their burden of overcoming the presumption of validity
16 solely by their "self-interested and conclusory statements."

17 The testimony of Dr. and Mrs. Enomoto lacked credibility.
18 They admit they signed notes that initiated certain of the loans
19 (e.g., the H Loan and the P Loan, see Ex. D-148A), but they have no
20 explanation as to why they were never called to pay off these loans
21 until Mr. Goddu's demand letter in September of 2001. They admit
22 they understood that the loans were "rolling," but they deny they
23 signed any of the loan documents that would have been required to
24 make that happen as a matter of contract law. Dr. and Mrs. Enomoto
25
26
27
28

1 ask the Court to find that Mr. O'Flaherty forged all of these
2 documents.¹⁵

3 Mrs. Enomoto was asked to sign Ex. D-151 in the courtroom.
4 She then testified about the distinctive features of her signature:
5 the "tails" on the first prong of the initial "H" in her first
6 name; the curved, rather than straight "E" in Leah; the fact that
7 she always included "Mahon" and "Enomoto" whenever she signed her
8 name; and the fact that when signing in a corporate capacity, she
9 always indicated her official corporate title. In the face of this
10 testimony, however, is Ex. P-7-O (the O Loan Note), which
11 Mrs. Enomoto admits she signed. There are no "tails" on the
12 initial "H"; the "E" in "Leah" is flat, not curved; and "Enomoto"
13 is missing completely. Similarly, the Marine View Deed of Trust,
14 which Mrs. Enomoto claimed was a forgery, is notarized - the
15 signature on the document does not show the "tail" on the initial
16 "H" nor does the name "Enomoto" appear. Mrs. Enomoto's claim that
17 the signature on this deed of trust must be forged merely because
18 the notary referenced was not their "usual" notary is not
19 believable.

20 During her testimony in court, Mrs. Enomoto was not always
21 able to accurately identify her signature. At one point during her
22

23 ¹⁵ It is true that in the RSM report, Ms. Howe found an
24 instance of an apparently forged signature on another bank
25 customer's executive line of credit. See Ex. D-111, p. ¶ 3. RSM
26 also found on Mr. O'Flaherty's computer two tax returns he
27 apparently fabricated for the Enomotos. These tax returns are not
28 in evidence, however, so the Court is unable to determine whether
he forged the Enomotos' signatures on the returns. Ms. Howe
testified that the tax returns had been filled in, but she could
not recall if they had been signed. There is, therefore, no direct
evidence that Mr. O'Flaherty ever forged a document alleged to be
signed by the Enomotos.

1 cross examination, she was shown a number of single pages on which
2 appeared only her "alleged" signature. She was asked to testify
3 which of the pages bore her authentic signature. Subsequently, the
4 bank produced and the Court admitted into evidence as Ex. P-56 each
5 of the documents from which the signatures were obtained. In all,
6 there were six pages showing her signature. Mrs. Enomoto testified
7 that Ex. P-56A and Ex. P-56B bore her signature, but that Exhibits
8 P-56C, P-56D, P-56E, and P-56F were forgeries. Exhibit 56C is a
9 declaration under penalty of perjury bearing Mrs. Enomoto's
10 signature which was submitted to the Superior Court. Mrs. Enomoto
11 testified that the signature on Ex. P-56C was not hers because, at
12 the time it was signed, she was in the hospital awaiting surgery.
13 She testified she asked a nurse to sign this declaration for her
14 because she was unable to sign it. The signature clearly does not
15 resemble Mrs. Enomoto's and there is no indication that someone
16 else has signed this for her. Mrs. Enomoto submitted the
17 declaration under penalty of perjury to a court of law without any
18 indication that she had not signed the document herself. Exhibit
19 P-56D is a Promissory Note for CSH in the principal amount of
20 \$328,844.48. Mrs. Enomoto shows on Ex. D-148A that page two of the
21 note does not follow content-wise with page one. She is correct
22 about that: the last line of page one does not accurately complete
23 on page two. Exhibits P-56E and P-56F are defendants' answers to the
24 discovery requests, submitted by counsel for the defendants to the
25 plaintiffs, showing Mrs. Enomoto's notarized signature. In
26 fairness to Mrs. Enomoto, the pages she was shown make the
27 signatures look fatter as a result of the copying process. More
28

Memorandum Decision - 32

1 importantly, however, in both Exhibits P-56E and P-56F there is no
2 tail on the initial "H" and the "E"s are all flat and not curved.

3 Dr. Enomoto never denied signing any document that bears his
4 name. Instead, he testified that he either did not recall signing
5 the document (e.g., the 8/20/96 Guaranty), he "probably" signed the
6 document (e.g., the N Loan Note), or he signed a signature page
7 only (e.g., the P Loan Agreement).

8 As the trier-of-fact, this Court has examined each of the
9 documents referenced in Section II.D, *supra*, and cannot conclude
10 that the signatures of the Enomotos, which appear on those
11 documents, are forgeries. The Court also rejects the Enomotos'
12 claim that they signed signature pages that were somehow
13 fraudulently attached to loan documents they did not intend to
14 sign. The signature pages attached to each of the loan documents
15 described in Section II.D., upon which the bank seeks to collect,
16 follow correctly from the preceding page - thus, they appear to be
17 the correct pages for the various documents. The Court concludes
18 that the pages were correctly attached and that the Enomotos did
19 not pay close attention to the documents before they signed them.

20 The Enomotos admit that they signed signature pages in blank.
21 Each promissory note upon which the bank seeks to collect states,
22 just above the signature line:

23 PRIOR TO SIGNING THIS NOTE, I, AND EACH OF US,
24 READ AND UNDERSTOOD ALL THE PROVISIONS OF THIS
NOTE, INCLUDING THE VARIABLE INTEREST RATE
PROVISIONS. I, AND EACH OF US, AGREE TO THE
TERMS OF THE NOTE.

26

27

28

Memorandum Decision - 33

1 (Capitalization in original).¹⁶ In the case of the guaranties,
2 language in the same position above the signature line reads:

3 EACH UNDERSIGNED GUARANTOR ACKNOWLEDGES HAVING
4 READ ALL THE PROVISIONS OF THIS GUARANTY AND
AGREES TO ITS TERMS.

5 (Capitalization in original).¹⁷ The Enomotos apparently disregarded
6 this language and abdicated their duty to make sure they were
7 affixing their signatures to documents they intended to be legally
8 enforceable against them. By failing to keep copies of the
9 documents, the Enomotos may not now deny that they did not intend
10 to sign the documents the bank seeks to enforce against them.

11 For the foregoing reasons, this Court concludes that each of
12 the loan documents referenced in Section II.D of this Memorandum
13 was validly executed and authorized by the signatory thereto.

14 B. Unauthorized Transfers.

15 The defendants challenge three types of unauthorized transfers
16 from and between their accounts: (i) transfers of funds between
17 their entities; (ii) specified transfers out of the checking
18 accounts of the Enomoto Entities; and (iii) transfers of funds from
19 their checking accounts by way of cashier's checks.

20

21 ¹⁶ The Court notes that Ex. P-8-O, the P Loan Agreement, has
22 Dr. Enomoto's signature line on page 4 by itself. Dr. Enomoto
admitted that he signed this signature page. The last paragraph on
23 page 3 of the agreement states: "By signing this Agreement, you
[borrower] acknowledge that you have read this Agreement. You also
24 acknowledge receipt of a completed copy of this Agreement,
including the Fair Credit Billing Notice."

25 ¹⁷ The Court notes that the Enomotos submitted a number of
26 declarations of friends or business associates who attested to
their good character. The Court gave these declarations little
27 weight, as none of these individuals testified at trial and the
Court regards the testimony of the Enomotos and the other evidence
28 presented at trial to be better indicators of their credibility.

1 1. Intercompany Transfers.

2 The defendants challenge each intercompany transfer of funds
3 between their loan and checking accounts as unauthorized transfers.
4 They claim these unauthorized intercompany transfers total
5 \$2,194,431.27 from the inception of the Banner Bank lending
6 relationship (August 26, 1996 through August 16, 2001). Exhibit D-
7 161 breaks these transfers down by entity. The bank's expert,
8 Robert Wagner, and the defendants' expert, Harvey Forman, traced
9 each of the intercompany transfers. Mr. Wagner is an outside
10 consultant and Mr. Forman is currently employed by Evergreen as its
11 office manager.

12 Mr. Wagner, the bank's expert witness, was engaged by the bank
13 to examine each of the loans at issue, to track the principal
14 balance of each, and to confirm that the Enomoto Entities received
15 all of the loan proceeds. Mr. Wagner produced Exhibit P-25, a
16 three-ring binder with his detailed analysis of each loan. He
17 testified extensively about the work papers contained in Exhibit P-
18 25. In addition, the bank asked Mr. Wagner to investigate each and
19 every transaction or transfer challenged by Mr. Forman in a
20 declaration he filed in state court.¹⁸ Mr. Wagner's analysis of
21 these disputed transactions is contained in Exhibits P-26, P-27 and
22 P-28, each of which is a three-ring binder.

23 There is no dispute between Mr. Wagner and Mr. Forman that, of
24 the \$2,194,431.27 in challenged intercompany transfers, only
25 \$12,500 was transferred outside of the Enomoto Entities.
26 Mr. Nelson testified that in calculating the total amount owed by
27

28 ¹⁸ Mr. Forman's declaration is Ex. P-16, which lists 94
transactions challenged by the defendants.

1 the defendants, the \$12,500 which was transferred out of the P Loan
2 proceeds on August 18, 2000 to an unrelated third party, was
3 credited back to the P Loan account effective August 18, 2000,
4 thereby negating any interest charges on that amount. Therefore,
5 the bank contends the defendants have not been damaged in any way
6 by the admittedly improper transfer. The defendants claim that all
7 of the other transfers, totaling \$2,181,931.27, were not authorized
8 intercompany transfers and the Court should therefore reduce the
9 bank's claim by this amount. For the following reasons, the Court
10 rejects this claim by the defendants.

11 a. Authorization.

12 Neither party produced any evidence of who initiated the
13 transfers the defendants challenge. There were no checks or other
14 written documents produced which initiated or authorized the
15 transfers. Each transfer appears to have been made electronically.
16 The Enomotos claim, without any evidentiary support, that
17 Mr. O'Flaherty initiated all of these transfers. The bank did not
18 specifically deny that the transfers were made by Mr. O'Flaherty,
19 nor did it produce any evidence that the transfers were initiated
20 by the Enomotos or someone with authority to act on their behalf.
21 Relying on Exhibit P-22A, the bank argued that the transfers were
22 authorized by Ms. Thomas. Exhibit P-22A is a handwritten note
23 purporting to bear the signature of Mrs. Enomoto and which reads in
24 its entirety:

25 I authorize Jan Thomas our corporate business
26 manager to manage, transfer, cash withdrawal, pull
27
28

1 any and all records to conduct business on any and
2 all accounts of Banner Bank.¹⁹

3 Mrs. Enomoto claims she did not write Ex. P-22A and that it is a
4 complete forgery. She claims to have been in Arizona on
5 December 20, 2000 when Ex. P-22A was allegedly written.

6 There is nothing in Article 3 or 4 of RCW 62A that requires
7 the authorization for an account transfer to be in writing. RCW
8 62A.4-401(a) provides that

9 (a) A bank may charge against the account of a
10 customer an item that is properly payable from
11 that account even though the charge creates an
12 overdraft. An item is properly payable if it
13 is *authorized by the customer and is in
14 accordance with any agreement between the
15 customer and bank.*

16 (Emphasis added). The term "item" is not defined, but presumably
17 it includes a transfer of the type at issue. Further, RCW 62A.3-
18 403 provides that even an unauthorized signature can be ratified.
19 Arguably, assuming its validity, Ex. P-22A could be read broadly to
20 authorize Jan Thomas to make phone transfers between the Enomoto
21 accounts. The problem with the bank's reliance on Exhibit P-22A,
22 however, is that there is no evidence that Jan Thomas did request,
23 authorize, or in any way initiate any of the challenged transfers.
24 Also, Ex. P-22A, which is dated December 22, 2000, could not be
25 relied upon for transfers prior to that date.

26 Although both Dr. and Mrs. Enomoto denied having personally
27 authorized any of the transfers, Dr. Enomoto admitted that he not
28 only knew about the transfers but that he was expecting
29 Mr. O'Flaherty to make these kind of transfers. Dr. Enomoto

30 ¹⁹ Importantly, Jan Thomas did not sign Ex. P-22A, so it would
31 not provide the bank with an example of her signature.

1 testified that Mr. O'Flaherty took it upon himself to make the
2 transfers that he thought were necessary. Dr. Enomoto never
3 testified, nor is there any evidence, that he ever objected to Mr.
4 O'Flaherty's intercompany transfers. Dr. Enomoto specifically
5 acknowledged that Mr. O'Flaherty would move money around to cover
6 overdrafts. He also testified that if the clinic needed money, his
7 wife's company might make a loan to the clinic and that Evergreen
8 would pay the Enomotos' personal expenses. Dr. Enomoto also
9 testified that although he knew Mr. O'Flaherty was moving money
10 between accounts, he assumed this meant between accounts *of the*
11 *same entity.*

12 Mrs. Enomoto claimed that the signature cards signed at the
13 outset of the banking relationship, which are Ex. D-31, did not
14 permit these transfers. The signature cards included in Ex. D-31
15 provide that withdrawals can be made via one signature and all but
16 one of the cards indicates that facsimile signatures are not
17 allowed. The cards also indicate, however, that the owners of each
18 account received an electronic funds transfer disclosure and agreed
19 to the terms of the disclosures. The disclosures and page two of
20 the signature card form are not in evidence so the Court cannot
21 determine what the Enomotos authorized by way of electronic
22 transfers, such as those at issue here.

23 b. Disclosure of Intercompany Transfers.

24 Mr. Wagner's loan-by-loan analysis in Exhibit P-25 shows that
25 each and every intercompany transfer challenged by the defendants
26 appeared either on one of their loan statements or one of their
27 checking account statements. Despite that, during the five-year
28 period in which these transfers occurred, not once did any of the

1 affected entities challenge any of the transfers. Instead, Mrs.
2 Enomoto claims that she and Dr. Enomoto and their companies never
3 received any bank account or loan account statements. She
4 testified repeatedly that she and other employees continually
5 requested these statements from Mr. O'Flaherty over this five-year
6 period, but never received the requested statements. Dr. Enomoto
7 testified that he believed they were not receiving statements, but
8 he clearly had no first-hand knowledge of this and did not testify
9 that he ever asked Mr. O'Flaherty himself for any statements.

10 Given the significant number of intercompany transfers which
11 have been challenged, one would have to believe that the Enomoto
12 Entities never received a single bank account or loan statement
13 during the five-year period at issue. In this Court's view,
14 Mrs. Enomoto's testimony is not credible. Mrs. Enomoto admitted
15 that she personally did not routinely review bank statements and
16 that she left this to employees. Instead, she reviewed only
17 summaries of statements prepared by her "team" of financial
18 assistants. One would assume that the statements would have had to
19 have been in the hands of those employees in order for them to
20 prepare the summaries. Further, despite the fact that Mrs. Enomoto
21 claims to have repeatedly requested Mr. O'Flaherty to send her
22 account and loan statements, there is no written evidence of any
23 such request from 1996 to 2001.

24 Mrs. Enomoto's testimony is also contradicted by Judy Silver's
25 letter. See Ex. P-32. In the August 20, 2001 letter, which Mrs.
26 Enomoto did not deny seeing at the time it was written, Ms. Silver
27 indicates that it was the internal record-keeping of Century Inc.,
28 Century Ltd. and CSH which created the accounting problems.

Memorandum Decision - 39

1 Ms. Silver's letter does not suggest that she needs anything from
2 the bank by way of bank or loan account statements or information
3 from the bank concerning intercompany or shareholder loans. When
4 Mrs. Enomoto was questioned about Ex. P-32, she testified that
5 information was needed from the bank to reconcile the transfers
6 between the entities. She clearly knew about the transfers,
7 therefore, and there is no evidence Mrs. Enomoto ever complained
8 about the transfers to the bank at any time before the litigation
9 was filed.

10 The checking account statements for the Enomoto Entities are
11 in evidence as Ex. D-165. Dr. and Mrs. Enomoto confirmed that the
12 addresses on the statements contained in that exhibit for each of
13 the Enomoto Entities was correct. Similarly, the loan account
14 statements showing the transfers are in evidence in various places
15 in Mr. Wagner's reports and the addresses for the Enomoto Entities
16 are the same. The bank presented testimony that checking and loan
17 account statements are sent monthly to its customers. The Enomotos
18 claim that Mr. O'Flaherty could have prevented the bank's regular
19 practice of sending these statements, but there is no evidence that
20 Mr. O'Flaherty ever took such action or ordered a subordinate to do
21 so. The defendants did not call any other employee responsible for
22 the financial information at the various Enomoto Entities to
23 corroborate their claim that they never received any statements
24 from the bank. Instead, Mrs. Enomoto detailed in her testimony how
25 every employee who was responsible for the financial aspects of the
26 Enomoto Entities was dismissed for fraud, embezzlement or some form
27 of impropriety. The list of terminated employees is lengthy. See
28 Ex. P-23, P-24 (as to Evergreen Employees).

Memorandum Decision - 40

1 The Court finds the testimony of Dr. and Mrs. Enomoto that
2 they never received any account or loan statements not credible.
3 The Court finds instead that the statements were sent to the
4 Enomoto Entities in the ordinary course of the bank's business and
5 that the Enomotos are charged with knowledge of what the statements
6 would have disclosed.

7 RCW 62A.4-406 deals with the rights and obligations of banks
8 and their customers with respect to bank statements. Subsection
9 (c) provides:

10 If a bank sends or makes available a statement
11 of account or items pursuant to subsection (a),
12 the customer must exercise reasonable
13 promptness in examining the statement or the
14 items to determine whether any payment was not
15 authorized because of an alteration of an item
16 or because of a purported signature by or on
behalf of the customer was not authorized. If,
based on the statement or items provided, the
customer should reasonably have discovered the
unauthorized payment, the customer must
promptly notify the bank of the relevant facts.

17 In addition, subsection (f) of RCW 62A.4-406 sets deadlines for
18 customers to discover and report any unauthorized signature or any
19 alteration on the face or back of an item. Subsection (a) of RCW
20 62A.4-406 requires the bank to provide information in the statement
21 that is "sufficient to allow the customer reasonably to identify
22 the items paid."

23 Although the intercompany transfers which are at issue here do
24 not fit neatly into the preceding statutory provisions which refer
25 to unauthorized signatures or alterations (because there is no
writing alleged to be unauthorized or altered), the intent of
26 RCW 62A-406 is applicable here. A bank has an obligation to
27 provide its customer with information that is sufficient to permit
28

Memorandum Decision - 41

1 the customer to identify the items and transfers that have been
2 made, and a bank customer has a corresponding obligation to
3 promptly review the information provided by the bank and notify the
4 bank of any transactions the customer did not authorize or any
5 mistake the customer believes the bank has made.

6 In this case, Banner Bank provided regular monthly statements
7 to the Enomoto Entities showing their loan and checking account
8 transactions. It is undisputed that between August 26, 1996 and
9 August 16, 2001, none of the Enomoto Entities made any written
10 objection to any transaction shown on any of their checking account
11 or loan account statements. The defendants contend that the
12 information provided to them in the statements was not adequate to
13 enable them to sufficiently identify the transactions and that the
14 bank "intentionally covered up this information to avoid discovery
15 by the customer of the Bank's consistent plan during at least 1999-
16 2001 (three years) of making unauthorized disbursements from the
17 loan accounts." See Non-Debtor Defendants' Post-Trial Brief of Law
18 Summary of Evidence ("Defendants' Post-Trial Brief"), p. 4.

19 An analysis of the defendants' contention is best conducted
20 using various examples. The first intercompany transfer challenged
21 by the defendants is a \$50,000 loan advance made on August 26,
22 1996. See Ex. D-161, p. 1 (of 4). The sum was advanced pursuant
23 to the terms of a promissory note dated as of August 20, 1996 in
24 the principal amount of \$600,000 under Loan No. 0169013075. Ex. D-
25 84. Both Century Inc. and Century Ltd. were obligors under the H
26 Loan, which is shown in the green box on Mrs. Enomoto's diagram in
27 Ex. D-148A. The Disbursement Authorization dated August 20, 1996
28 which accompanied the note (Ex. D-84), indicates that the purpose

1 of the loan was for construction and development, which is
2 consistent with Mrs. Enomoto's testimony. Mr. Wagner tracked the
3 advances made under this loan in Ex. P-25, Tab 1. The \$50,000
4 advance at issue is shown on page 201 in the exhibit. Mr. Wagner's
5 exhibit also shows that the advance was deposited into the account
6 of Century Ltd., an obligor under the note. The advance is shown
7 as a credit on Century Ltd.'s bank statement showing transactions
8 between August 23, 1996 through August 30, 1996 (See p. 00509 of
9 Ex. P-25, Tab 1). The loan account number for the H Loan,
10 0169013075, is referenced in the statement. The statement shows
11 another credit to the account of \$10,000, referenced as a "Loan
12 Advance" without any reference to a loan number. Mr. Wagner's Tab
13 1 in Ex. P-25 shows the advance was also made under the H Loan.
14 Finally, the bank statement shows that \$50,000 in the account was
15 transferred to "Another Account" with no reference to an account
16 number. Although the latter two transfers do not refer to a
17 specific loan or account number, this Court concludes that the
18 statement discloses sufficient information to enable the account
19 holder to determine more specific information from its records,
20 including the statements of related entities, or to suggest that
21 the account holder seek additional information from the bank.

22 The Court also finds that, at least as to the intercompany
23 transfers between Century Inc., Century Ltd. and CSH, the
24 defendants are precluded from avoiding those transfers because of
25 their failure to keep their corporate operations separate. Century
26 Inc, Century Ltd. and CSH all shared the same office space, worked
27 on the same project(s), shared the same officer and shareholder
28 (Mrs. Enomoto), and shared the same employees. CSH never had an

Memorandum Decision - 43

1 ongoing business operation, Century Ltd. was merely a real estate
2 holding company, and Century Inc. had only limited operations.
3 Given that Mrs. Enomoto treated these entities as one, the Court
4 finds nothing improper about the intercompany transfers between
5 them regardless of who orchestrated those transfers.

6 As to transfers in and out of Evergreen, the Court is bound by
7 the Summary Judgment in the state court action which set the amount
8 of the bank's claim under the M Loan and confirmed the bank's
9 security interest in the Collateral to secure that loan. Evergreen
10 had an opportunity to argue in state court that the balance of the
11 M Loan should be reduced on account of the intercompany transfers
12 but the state court rejected that argument. Moreover, out of the
13 \$108,000 in transfers out of Evergreen (Ex. D-161, p. 3), \$65,000
14 went into the joint account of Dr. and Mrs. Enomoto. This would be
15 consistent with their testimony that they routinely used funds of
16 Evergreen to pay their own personal expenses. Of the remaining
17 transfers, \$5,000 was transferred to CSH, \$2,500 to Century Inc.,
18 and \$35,000 to Century Ltd. Exhibit D-161 also shows that
19 Evergreen was the recipient of transfers totaling \$112,000 from
20 CSH, Century Inc. or Century Ltd., plus a \$3,000 transfer from the
21 O Loan, under which Mrs. Enomoto was obligated. Thus, Evergreen
22 actually received slightly more money from related entities than it
23 paid out.

24 The evidence shows that the intercompany transactions at issue
25 were anticipated by the Enomotos and were sufficiently disclosed on
26 statements from the bank without any objection by the Enomotos for
27 a period of years. Thus, the Court finds that the Enomoto Entities
28

1 ratified these intercompany transfers under RCW 62A.3-403 by
2 failing to timely object to them.²⁰

3 2. Unauthorized Transfers from Checking and Loan Accounts.

4 The defendants also challenge many transfers identified by Mr.
5 Forman in a Declaration dated November 10, 2003 which was filed in
6 the state court action and which is Ex. P-16 (the "Forman
7 Declaration").²¹ Mr. Wagner attempted to trace each of the
8 challenged transfers and his work papers are contained in Exhibits
9 P-25, P-26, P-27, and P-28. Mr. Wagner summarized his calculations
10 in Exhibit P-31, which exhibit notes that he was unable to trace
11 \$89,262.96 of the transfers of funds identified in Mr. Forman's
12 Declaration. The Court will deal separately with each group of
13 transfers in the order set forth in the Forman Declaration.

14 a. Evergreen Checking Account 169022803.

15 The Forman Declaration identifies \$47,165.31 in alleged
16 unauthorized transfers from Evergreen checking account number
17 870000733. Mr. Wagner traced those transfers in Ex. P-26, Tab A.
18

19 ²⁰ The Court notes that even if the transfers were not
20 authorized, the Enomoto Entities would not be entitled to a
21 recredititing of their accounts if the bank's action caused them no
22 loss. *Gatoil (U.S.A.), Inc. v. Forest Hill State Bank*, 1 UCC
23 Rep.Serv.2d 171, (1986); see also RCW 62A.4-406(e). In this case,
the defendants have failed to show how any of the defendants were
harmed by these intercompany transfers. As a group they received
all of the money that was transferred except for \$12,500, which the
bank reccredited back.

24 ²¹ In their brief, the defendants also referred to
25 unauthorized deductions allegedly made from their checking accounts
26 totaling \$393,285.15. Mr. Adler referred to these transfers in his
27 closing argument; yet, the Court can find no reference to how this
28 number was calculated in any of the oral testimony or written
evidence. In his direct testimony, Mr. Forman did not refer to
this number. Because there is no evidence in support of this
claim, the Court finds that the defendants are not entitled to a
setoff or deduction for \$393,285.15.

1 The largest transfer in this group, in the amount of \$26,773.04,
2 was a cashier's check issued on May 8, 1998 payable to the Internal
3 Revenue Service. Evergreen does not deny that the check was paid
4 to the Internal Revenue Service and the check is not listed in the
5 binder of disputed cashier's checks, Ex. D-54. Accordingly, the
6 Court concludes that Banner Bank has accounted for each of the
7 transfers in this category.

8 b. Century Ltd. Account No. 167008416.

9 Mr. Forman's Declaration identifies \$108,247.36 in
10 unauthorized transfers from Account No. 167008416 of Century Ltd.
11 Mr. Wagner tracked the transfers in Ex. P-26, Tab B. There are two
12 unnumbered checks in this group, both of which appeared on the bank
13 statement sent to Century Ltd. If there were concerns about the
14 checks, Mrs. Enomoto's financial team could have questioned the
15 bank. There are also two cashier's checks in this group of
16 transfers, but the checks are not included in Ex. D-54. Therefore,
17 the Court concludes the bank has adequately traced the transfers in
18 this category.

19 c. Enomoto Account No. 87500500.

20 The defendants challenge \$13,100 in alleged unauthorized
21 transfers from the Enomotos' joint personal account. Mr. Wagner
22 traced three of the four transfers in Ex. 26, Tab C. He admitted
23 he could not trace a \$1,000 transfer; thus, the Enomotos are
24 entitled to a recrediting of that amount. The balance of the
25 transfers were traced to telephone transfers.

26

27

28

1 d. H Loan Account No. 169013075.

2 The Foreman Declaration identifies \$356,068.54 in unauthorized
3 transfers from the H Loan account.²² Mr. Wagner traced these
4 transfers in Ex. P-25, Tab 1A. The one transfer that stands out in
5 the group of 15 transfers noted is a \$200,000 transfer on
6 February 16, 1999. According to Mr. Wagner's accounting (Ex. P-25,
7 Tab 1A, p. 00203) a payment was made on the H Loan by way of a
8 transfer from loan account number 16922803 (*Id.* p. 00131). The
9 payment reduced the H Loan balance from \$775,000 to \$575,000. On
10 February 26, 1999, a loan advance of \$200,000 was charged to the H
11 Loan effective as of February 15, 1999, increasing the H Loan
12 balance to \$775,000.

13 No distribution of \$200,000 was made to any of the Enomoto
14 entities and the Court can find no reference to this transfer in
15 any loan or bank statement in evidence. It appears that this was a
16 transfer orchestrated by Mr. O'Flaherty to make the loan balance
17 look lower on February 16, 1999 than it actually was. The Court
18 can find no promissory note associated with loan account number
19 16922803, consistent with Mr. Forman's statement in his Declaration
20 on page two that the loan was unknown to the Enomotos. Mr. Wagner
21 confirmed in his testimony that he could not locate a note
22 associated with this account and he agreed that this appeared to
23 have been an internal entry only. Although the transaction appears
24 to be improper, it does not appear that the Enomoto entities were
25 damaged in any way by it. Accordingly, the Court concludes that
26

27 ²² The total of these transfers should actually be less
28 because a \$500 transfer on July 1, 1997 is shown incorrectly in the
Forman Declaration as a \$5,000 transfer.

1 the defendants are not entitled to any reduction in their
2 obligation to the bank on account of any transactions in this
3 category.

4 e. Mrs. Enomoto Account No. 81500688.

5 Mr. Forman has identified six transfers totaling \$14,000 from
6 Mrs. Enomoto's checking account that he claims were unauthorized.
7 Mr. Wagner traced these transfers in Ex. P-26, Tab D. He was able
8 to track each transfer except for a \$1,000 transfer on February 28,
9 2000. Other than the \$1,000 transfer, for which Mrs. Enomoto is
10 entitled to a recredit to her account, the Court is satisfied that
11 the bank has accounted for the other transfers.

12 f. Century Inc. Account No. 167016195.

13 Mr. Forman identified three transfers totaling \$85,396.65 from
14 Century Inc.'s checking account which he contends were
15 unauthorized. Mr. Wagner traced two of the transfers in Ex. P-26,
16 Tab E. Mr. Wagner admitted that he could not track the \$35,038
17 transfer made on October 20, 2000. The bank statement states that
18 \$35,038 was transferred "to another account." *Id.* at p. 001674.
19 The other two transfers represent deductions for one or more
20 cashier's checks which the Court has dealt with in Section B.3
21 below. Based upon the bank's inability to account for the \$35,035
22 transfer on October 20, 2000, the Court will order this amount to
23 be recrated to Century Inc.

24

25

26

27

28

1 g. CSH Account No. 87004453.²³

2 The Forman Declaration lists numerous transfers from the CSH
3 checking account, most of which are attributable to the issuance of
4 cashier's checks. Mr. Wagner's accounting of the transfers in this
5 category is at Ex. P-28, Tab F. Mr. Wagner could not trace a
6 February 7, 2001 transfer of \$21,376; therefore, CSH is entitled to
7 a credit for this amount.

8 Two other transfers shown in this category are worthy of
9 mention. The first is a transfer of \$675,229.80 on August 18,
10 2000. That transfer appears on the bank account statement for the
11 period ending August 31, 2000. Ex. P-25, Tab 7, p. 00152.
12 Mr. Wagner provided a lengthy explanation for the various transfers
13 shown on this statement. The statement shows a \$480,000 loan
14 advance from the O Loan as well as an additional deposit in the
15 amount of \$337,614.90. Mr. Wagner testified that the \$337,614.90
16 deposit was actually a mistake which was corrected on the debit
17 side of the account statement by a withdrawal of \$675,229.80. The
18 net effect of the transfers was that \$50,000 from the O Loan
19 proceeds was transferred to the H Loan on August 14, 2000,
20 \$86,128.09 was transferred to the K Loan on August 17, 2000, and
21 the remaining amount of \$337,614.90 was transferred to the H Loan
22 on August 18, 2000. The \$337,614.90 transfer is shown as a
23 deduction to the H Loan balance by two payments, one in the amount
24 of \$102,389.90 and one in the amount of \$235,225. Ex. P-25, Tab
25 1A, p. 00203. Thus, although the bank statement is very confusing,
26

27 ²³ The Forman Declaration incorrectly refers to this account
28 as an account of Century Inc. According to the statements in Ex.
P-28, Tab F, this account actually belongs to CSH.

1 Mr. Wagner has provided an explanation of the numbers shown on it,
2 which explanation the Enomotos could have obtained from the bank
3 had they inquired.

4 The other transfer about which there was considerable
5 testimony at trial was a \$60,000 transfer made on May 25, 2001.
6 This amount was deducted from the CSH account and transferred into
7 the account of another customer of the bank, completely unrelated
8 to any of the Enomoto entities. The unrelated customer spent the
9 money and the bank did not discover the error until December of
10 2001. Banner Bank contends that CSH did not suffer any damage as a
11 result of this transfer because once the bank discovered the error,
12 the overdraft fee which had been charged CSH on account of the
13 transfer was reversed and the \$65,000 overdraft balance remaining
14 in the account when the litigation was commenced was written off by
15 the bank. The Court does not agree with this analysis.

16 The bank account statement for CSH for the period ending
17 May 31, 2001 shows the \$60,000 transfer. Despite the wrongful
18 transfer, CSH still had a positive bank balance at the end of the
19 month in the amount of \$51,295.24. Ex. 165, p. BBE08310. As of
20 June 29, 2001 and July 31, 2001, CSH still had a positive bank
21 balance even though the \$60,000 transfer had not yet been reversed.
22 *Id.* It was not until the end of August that CSH was overdrawn by
23 about \$43,000. The statement reflects that on August 14, 2001 an
24 advance of \$60,000 was made from the N Loan and deposited into this
25 account. This might not have been necessary had the account
26 already been recrated with the \$60,000 transfer. By October
27 2001, CSH was overdrawn by \$65,843.04, including check handling
28

1 fees and overdraft interest charges. The recrediting of the
2 account in December of 2001 was meaningless to CSH by that time.

3 The Court concludes that the bank should be required to refund
4 the wrongful \$60,000 under the facts of this case. Although the
5 transfer was disclosed on the CSH statement, the Court is not
6 inclined to put the burden on CSH to have discovered this
7 particular transfer. There is no evidence this \$60,000 transfer
8 was initiated in any way by the Enomoto entities and the bank is
9 charged with the knowledge that the transfer was unauthorized. In
10 addition, the Court will award CSH a setoff against its obligations
11 in the amount of all check handling and overdraft interest charges
12 on this CSH bank account on or after May 25, 2001. Finally, the
13 Court will require that interest charges on the N Loan advance of
14 \$60,000 made on August 14, 2001 be deducted from the balance owing
15 on the N Loan.

16 h. Mrs. Enomoto Account No. 169029287.

17 Mr. Forman challenged as unauthorized a loan advance in the
18 amount of \$242,588.59 made on August 13, 2001 from the N Loan.
19 Mr. Wagner traced these loan proceeds in Ex. P-25, Tab 6, p. 00184.
20 Mr. Wagner testified that this transaction was similar to the
21 \$200,000 transfer described in subsection (d) *supra*. The transfer
22 was made only on the bank's internal books. It appeared to have
23 been initiated by Mr. O'Flaherty and then reversed later with an
24 effective date of August 13, 2001. Using this transfer
25 Mr. O'Flaherty was able to make the loan balance appear to be zero
26 for the bank's internal purposes. No amount was ever charged to
27 the loan or transferred out of the account of the Enomotos. In
28 this instance, according to Mr. Wagner, Mr. O'Flaherty used a

1 suspense account to hold the \$200,000 transfer from August 3, 2001
2 to August 10, 2001 when Mr. O'Flaherty reversed the transfer.

3 While the Court agrees that this transfer is clearly improper,
4 it had no impact on the Enomotos or their entities. If any entity
5 was harmed by this transfer, it was Banner Bank.

6 i. Century Inc. Account No. 169030947.

7 The Forman Declaration challenges a \$599,934.10 loan advance
8 made under the J Loan on May 13, 2001. Mr. Wagner tracked this
9 transfer in Ex. P-25, Tab 2. This transfer is another internal
10 Banner Bank transfer orchestrated by Mr. O'Flaherty. On August 3,
11 2001, the loan account balance was reduced to zero by a payment
12 from a nonexistent loan account. Then, the payment was reversed on
13 August 17, 2001 with an effective date of August 3, 2001. Thus,
14 there was no impact on Century Inc., no interest charged on the
15 account and no transfer of any funds belonging to Century Inc.
16 Consequently, the Court finds that the defendants were not damaged
17 on account of this internal bank transfer.

18 j. CSH Account No. 169033057.

19 The Forman Declaration identifies a \$474,930.95 transfer made
20 under the L Loan. The transfer actually occurred on August 13,
21 2001, not May 13, 2001 as stated in Mr. Forman's Declaration.
22 Mr. Wagner's work papers in Ex. P-25, Tab 4 confirm that this
23 transfer is another of Mr. O'Flaherty's internal bank transfers to
24 make the L Loan balance look like it had a zero balance as of
25 August 3, 2001. For the same reasons articulated in the preceding
26 paragraphs, the Court will not award any damages to the defendants
27 on account of this transaction.

1 k. Enomotos Account No. 161505904.

2 Mr. Forman identifies two transactions totaling \$128,302.79
3 that are claimed to be unauthorized transfers from the joint
4 account of Dr. and Mrs. Enomoto. Of this amount, Mr. Wagner was
5 able to account for all but \$10,302.79 of the funds. See Ex. P-28,
6 Tab G. Accordingly, the Court will award \$10,302.79 in damages
7 against Banner Bank.²⁴

8 3. Cashier's Checks.

9 The defendants claim that the bank issued cashier's checks
10 totaling \$739,583.72²⁵ drawn on the accounts of the Enomoto Entities
11 without proper authorization. Mr. Forman prepared a binder showing
12 all of the challenged cashier's checks, which binder was admitted
13 into evidence as Ex. D-54. The checks are broken down by entity as
14 follows:

15 Checks on CSH account:	3/21/00-9/25/01 =	\$593,772.71
16 Checks on Century Inc. account:	10/3/00-5/31/01 =	\$ 78,779.02
16 Checks on Mrs. Enomoto account:	8/28/00-6/6/01 =	<u>\$ 67,031.99</u>
		\$739,583.72

17 At the beginning of each section of Ex. D-54, Mr. Forman has
18 prepared a list of each check, the date the check was issued, and
19 the name of the payee. Copies of the cashier's checks, the debit
20

22 ²⁴ Mr. Forman concludes his Declaration by identifying two
23 documents, a November 10, 2000 Change in Terms Agreement and an
24 undated Commercial Guaranty that he opines are forgeries. The
25 Court did not qualify Mr. Forman as a handwriting expert and
therefore rejects any opinion he offers as to the validity of Mrs.
Enomoto's signature. The Court addressed the forgery issues in
Section IV.A *supra*.

26 ²⁵ The Defendants' Post-Trial Brief at page 5 describes an
additional \$20,810.17 in cashier's checks not included in Ex. D-54.
Because no evidence of these checks was produced at trial and
because Mr. Forman did not refer to these checks in his testimony,
the Court will not consider them.

1 receipts for the cashier's checks, and some copies of the back
2 sides of the cashier's checks are also included in Ex. D-54.²⁶

3 Mrs. Enomoto testified that she did not authorize any of the
4 cashier's checks in Ex. D-54 except for two checks that were made
5 payable to her: one check in the amount of \$6,000 in October of
6 2000 and another check in the amount of \$6,000 in July or August of
7 2001. Mrs. Enomoto did not explain how these checks were obtained
8 from the bank and why she would have required cashier's checks from
9 her own companies. She believed that Ms. Thomas fabricated a
10 scheme to use cashier's checks to embezzle monies from Mrs.
11 Enomoto's companies while Mrs. Enomoto was in Arizona from October
12 of 2000 to July or August of 2001. Indeed, the time period for the
13 cashier's checks drawn on the accounts of Century Inc. and Mrs.
14 Enomoto's personal account coincides with her absence. The
15 withdrawal of monies from the CSH account, however, commenced in
16 March of 2000, well before Mrs. Enomoto left for Arizona.

17 Mrs. Enomoto admitted that after January of 2000, her
18 companies had no revenues or income. She claimed she was paying
19 operating expenses from personal funds she had in savings at
20 another bank. She then testified that she received cashier's
21 checks "from Mr. O'Flaherty" totaling \$150,000 as reimbursement for
22 her payment of these operational expenses from personal funds.
23 This testimony was inconsistent with her testimony and that of Mr.
24 Forman that cashier's checks were not routinely used to pay
25 expenses.

26 ²⁶ The copies are not complete and the parties disputed whose
27 fault it was that copies of the back side of each of the negotiated
28 cashier's checks was not available. The Court declined to resolve
this dispute at trial.

1 Mr. Forman relied on Mrs. Enomoto's contention that she did
2 not authorize the issuance of the cashier's checks and he therefore
3 made no investigation of the named payees on the checks to
4 determine if they were legitimate creditors of Century Inc., CSH or
5 Mrs. Enomoto or whether they actually received payment of the
6 funds. On cross examination, Mr. Forman admitted that some checks
7 included in his binder should not have been because they were
8 payments to creditors.

9 The bank presented testimony equally lacking in credibility.
10 The bank attempted to show that Mrs. Enomoto authorized Jan Thomas
11 to procure cashier's checks while Mrs. Enomoto was in Arizona and
12 that the checks were used to pay the ongoing expenses of the
13 companies and Mrs. Enomoto. The bank again relied on Ex. P-22A,
14 arguing that this document would have authorized Ms. Thomas to
15 obtain cashier's checks drawn on the Enomoto Entities' accounts.
16 The bank presented no evidence, however, that it was Jan Thomas who
17 procured all these cashier's checks.

18 A careful review of the documents in Ex. D-54 reveals that
19 many of the cashier's checks were signed by Rory O'Flaherty (see,
20 e.g., Ex. D-54, Tab 3, p. 006325) but other checks were signed by
21 Kathy Kill. See e.g., Ex. D-54, Tab 2, p. 006317. While at least
22 one, and possibly more, of the debit slips were signed by Jan
23 Thomas, see, e.g., Ex. D-54, Tab 8, p. BBE12730, the overwhelming
24 majority of the debit slips appear to have been signed by Joe
25 Torres, an employee of the bank who, as noted in the RSM report,
26
27
28

1 reported to and worked closely with Mr. O'Flaherty.²⁷ See, e.g.,
2 Ex. D-54, Tab 12, p. BBE12881 (which refers to "per Joe"), Tab 7,
3 p. BBE12673, Tab 9, p. BBE12747. Some of the debit slips are not
4 signed at all. See, e.g., Ex. D-54, Tab 10, p. BBE12814.

5 Neither party produced any testimony describing the specific
6 procedure by which a cashier's check was obtained from the bank,
7 including what forms were required to be completed and by whom.
8 Neither party offered any evidence about the individuals whose
9 names appear on the debit slips as to whether these individuals
10 were bank employees or employees of the Enomoto Entities. There is
11 no evidence that the bank's procedure would have permitted Jan
12 Thomas to request the issuance of cashier's checks by telephone and
13 no evidence that she ever did so.

14 A cashier's check is defined in RCW 62A.3-104(g) as "a draft
15 with respect to which the drawer and drawee are the same bank or
16 branches of the same bank." Typically, a bank will charge the
17 amount of the cashier's check against its customer's account at the
18 time the cashier's check is issued by the bank. Cashier's checks
19 play a significant role in the commercial world today. Once
20 issued, a cashier's check represents an obligation of the bank and
21 no longer an obligation of the bank customer upon whose account the
22 check is drawn. The payee may rely on the financial wherewithal of
23 the bank and not the sometimes unreliable financial condition of
24 the bank's customer.

25 Under the Uniform Commercial Code, as with other checks, the
26 bank may charge the customer's account for a cashier's check which
27

28 ²⁷ There is nothing in evidence to confirm, however, that these are in fact Mr. Torres' signatures.

1 is "properly payable from" the customer's account. RCW 62A.4-401.
2 The bank has the burden of demonstrating that the charge is
3 authorized. In this case, the bank produced no evidence that the
4 issuance of the cashier's checks was authorized by the three
5 account holders: CSH, Century Inc., and Mrs. Enomoto. In addition,
6 the Court finds that the account statements did not provide
7 sufficient information describing these items such that Mrs.
8 Enomoto would have been able to identify mistakes or
9 misappropriations of funds from these accounts.

10 To determine how these cashier's checks would have appeared on
11 the bank account statements, the Court followed the progression of
12 nine checks which are shown on the list for CSH (p. 5 of 11, Ex. D-
13 54) as having been issued on March 6, 2001. These checks were
14 payable as follows: H.L Mahon (\$6,000); J.M. Thomas (\$2,500);
15 Karen Deland (\$236.25); N. Cardenas (\$205); Arete Designs (\$1,800);
16 Bookkeeping Solutions (\$735); 3D (\$630); Dorothy Brumberg (\$450);
17 Construction Consultants (\$400). The checks total \$12,956.25. The
18 request for the issuance of the checks appears in Tab 7 of Ex. D-
19 54, at p. BBE12673. The debit slip appears to be signed by Joe
20 Torres and shows only the total of \$12,956.25, not the checks that
21 were actually issued. Credit copies of each of the checks that
22 were issued follow at pages BBE12673-BBE12680. The backs of the
23 checks are also included but are not legible enough for the Court
24 to discern any signature or endorsement on the back. Exhibit D-165
25 contains the bank statements for CSH at Tab 6. The \$12,956.25
26 deduction from CSH's account on March 6, 2001 is shown on the
27 checking account statement for the period March 1, 2001 through
28 March 30, 2001 (p. BBE08308). Only the total amount appears, with

1 no reference to a particular check number and no reference to the
2 nine different checks that were actually issued. Had regular
3 checking account checks been used, each would have appeared by
4 item, date cleared and amount. The cancelled checks would have
5 been returned to the account holder, unlike cashier's checks, which
6 are not returned to the customer.

7 The Court finds that without proof the cashier's checks at
8 issue were validly authorized and requested by the account holders,
9 the checks should not have been charged against the accounts.
10 During the testimony, the defendants admitted that the following
11 cashier's checks drawn on the CSH account were authorized: \$12,000
12 for two cashier's checks issued to Mrs. Enomoto and a cashier's
13 check payable to Radford & Co., a landlord, in the amount of \$1,765
14 (Ex. D-54, Z-5, p. BBE 12599). The Court finds that the following
15 amounts must be recrated by the bank to the accounts of CSH,
16 Century Inc. and Mrs. Enomoto as indicated below:

17 CSH: \$593,772.71 less \$13,765 (authorized checks) = \$580,007.71	
Century, Inc.:	78,779.02
18 Mrs. Enomoto:	67,031.99
Total:	\$725,818.72

19 C. Fraud.

20 1. Elements of Fraud.

21 The defendants have the burden of proving the nine elements of
22 fraud: (1) representation of an existing fact; (2) materiality of
23 the representation; (3) falsity of the representation;
24 (4) knowledge of the falsity or reckless disregard as to its truth;
25 (5) intent to induce reliance on the representation; (6) ignorance
26 of the falsity; (7) reliance on the truth of the representation;
27 (8) justifiable reliance; and (9) damages proximately caused by the
28

1 fraud. Fraud must be proved by clear, cogent and convincing
2 evidence.

3 2. Alleged Fraud Related to the M Loan.

4 As noted above, this Court previously held that the Summary
5 Judgment was entitled to both *res judicata* and collateral estoppel
6 effect in this proceeding. The Enomoto defendants asserted in the
7 state court action, in response to Banner Bank's motion for summary
8 judgment on the amount and validity of the M Loan, that the M Loan
9 was procured through fraud on the bank's part through the actions
10 of Mr. O'Flaherty. See Defendants' Memorandum in Opposition to
11 Plaintiff's Motion for Summary Judgment, filed November 10, 2003.
12 The state court rejected this argument and entered the Summary
13 Judgment. That judgment is binding in this case. Because the
14 claim of equitable subordination, however, was not available to
15 Evergreen in the state court action, the Court will consider
16 Evergreen's allegations of fraud only in connection with that claim
17 made in this proceeding. See Section F, *infra*.

18 3. Alleged Fraud Related to the O Loan.

19 Mrs. Enomoto contends that when the O Loan was issued,
20 Mr. O'Flaherty fraudulently misrepresented to her that the proceeds
21 of the O Loan would be sufficient to pay off all of the existing
22 indebtedness of CSH, Century Inc. and Century Ltd. The bank's
23 evidence shows the O Loan was made in August of 2000, but Mrs.
24 Enomoto claims the only valid note for O Loan advances she ever
25 signed was dated July 17, 2001. See Ex. P-7-O. According to the
26 evidence, the \$490,000 O Loan proceeds would not have been
27 sufficient to pay off the corporate debt on either of those dates.
28

1 Mr. Wagner's materials in Ex. P-25, Tab 7, track the O Loan.
2 The bank's ledger shows that the loan commenced in August of 2000,
3 but the earliest promissory note in evidence related to the O Loan
4 is a December 14, 2000 promissory note in the principal amount of
5 \$490,000. Ex. P-53. The note bears the signature of Mrs. Enomoto.
6 The bank's ledger (Ex. P-25, Tab 7, p. 0148) shows that a principal
7 advance was made on August 25, 2000 in the amount of \$480,000. The
8 Court, on page 49 *supra*, analyzed the disbursement of those funds:
9 \$50,000 was transferred to the H Loan on August 14, 2000,
10 \$86,128.09 was transferred to the K Loan on August 17, 2000, and
11 the net amount of \$337,614.90 (in two payments) was transferred to
12 the H Loan on August 18, 2000.

13 Loan	14 Principal Balance Before Payment	15 Principal Payment Amount	16 Principal Balance After Payment
17 H Loan	18 \$775,000 (8/17/00)	19 \$285,225 ²⁸	20 \$489,775
21 K Loan	22 \$370,844.48 (8/17/00)	23 \$44,027.18 ²⁹	24 \$326,817.30
25 Total	26 \$1,145,844.48	27 \$329,252.18	28 \$816,592.30

29 The proceeds of the O Loan, assuming it was advanced in August of
30 2000, would not have been sufficient to pay off the H and K Loans,
31 even if the entire advance of \$480,000 had been applied to
32 principal.³⁰

33
34
35

²⁸ Of the \$337,614.90 payment on the H Loan, \$102,389.98 was
36 applied to interest.

37 ²⁹ Of the \$86,128.09 payment on the K Loan, \$42,100.91 was
38 applied to interest.

39 ³⁰ As of August 2000, only the H and K Loans had been
40 advanced.

The proceeds of the O Loan would not have been sufficient to
retire all of the corporate debt in July of 2001, when Mrs. Enomoto
admits that she signed the O Loan Note.³¹ This is the only note
Mrs. Enomoto admits having signed related to the O Loan. By that
date, according to the bank's loan ledger, the balance of the H
Loan was up to \$496,775 (Ex. P-25, Tab 1A), the balance of the J
Loan was \$599,934.10 (Ex. P-25, Tab 2), the balance of the K Loan
was \$326,817.30 (Ex. P-25, Tab 3), and the balance of the L Loan
was \$474,930.95 (Ex. P-25, Tab 4). Thus, in July of 2001, the O
Loan proceeds of \$480,000 would clearly not have been sufficient to
pay off the total corporate debt of \$1,898,457.35.

Mrs. Enomoto claims that had the intercompany transfers not been made, had the cashier's checks not been issued by the bank, and had late charges and excess interest not been charged to her companies, the O Loan proceeds would have been sufficient to pay off the corporate debt. These are breach of contract issues, however, not fraud issues. Mrs. Enomoto did not explain how Mr. O'Flaherty's fraudulent misrepresentation of what the O Loan would pay damaged her. She did not prove that the interest rate on the O Loan was higher than the interest rate on the loans that were paid from the O Loan proceeds. In essence, her execution of the O Loan did nothing more than move indebtedness from one obligation to another. Mrs. Enomoto's claims with regard to the balances of her corporate loans, including her claims as to the cashier's checks

26 ³¹ Mrs. Enomoto contends that any note related to the O Loan
which was signed prior to July 17, 2001 was a forgery. As
27 described *supra* at p. 49, however, the \$480,000 advance in August
of 2000 which the bank contends was the initial advance under the O
28 Loan was shown on the CSH bank account statement for the period
ending August 31, 2000. Ex. P-25, Tab 7, p. 0152.

1 and intercompany transfers, have already been addressed by the
2 Court. Therefore, the Court concludes that even if Mr. O'Flaherty
3 fraudulently misrepresented that the O Loan would pay off Mrs.
4 Enomoto's corporate entities' debt, Mrs. Enomoto has not proved any
5 damage proximately caused by that misrepresentation.

6 4. Alleged Fraud Related to the P Loan.

7 Dr. Enomoto makes a similar fraud claim about the P Loan: that
8 Mr. O'Flaherty misrepresented to him that the P Loan proceeds would
9 be sufficient to pay off all of Evergreen's corporate debt. It was
10 necessary to pay off the Evergreen debt, according to Dr. Enomoto,
11 to make Evergreen's balance sheet more attractive to Swedish
12 Hospital in a proposed transaction under discussion in the summer
13 of 2000 in which the Evergreen clinic would be purchased by
14 Swedish. Dr. Enomoto never testified that the Swedish Hospital
15 transaction fell apart because Evergreen's corporate debt was not
16 paid from the proceeds of the P Loan. On the contrary, Mrs.
17 Enomoto testified that the Swedish transaction never materialized
18 for reasons completely unrelated to Evergreen's balance sheet or
19 debt levels.

20 Dr. Enomoto further contends that had the P Loan proceeds paid
21 off Evergreen's debt in full, then the M Loan would not have been
22 necessary at all. This has nothing to do with fraud, however.
23 Rather, it has to do with the breach of contract claims raised by
24 Dr. Enomoto and Evergreen. Dr. Enomoto entered into the M Loan
25 over a year after the P Loan was made. If Dr. Enomoto thought the
26 P Loan had paid off all of Evergreen's debt in August of 2000, he
27 should have asked for a complete accounting before signing the M
28 Loan note.

Memorandum Decision - 62

1 For the foregoing reasons, the Court rejects Dr. Enomoto's
2 fraud claim.

3 D. Breach of the Duty of Good Faith and Fair Dealing.

4 The Court need not decide whether, as argued by the
5 defendants, Banner Bank breached a good faith requirement inherent
6 in the banking relationship. The facts of this case do not
7 demonstrate that either side in this litigation deserves the
8 benefit of this doctrine. Dr. and Mrs. Enomoto failed to
9 adequately supervise the employees they put in charge of their
10 finances, failed to notify the bank of errors in and problems with
11 their deposit and loan accounts, and failed to disclose to bank
12 officers the concerns they had specifically about Jan Thomas. The
13 bank, on the other hand, failed to adequately supervise Mr.
14 O'Flaherty who was thereby able to manipulate customer accounts.
15 Given the failures of both parties, the Court rejects the notion
16 that either side is entitled to any damages on account of the
17 breach of the duty of good faith in contract dealings.

18 E. Overdraft Charges, Late Fees, and NSF Charges.

19 The defendants argue that because it was Mr. O'Flaherty
20 controlling the flow of funds from and between their loan accounts
21 and between their checking accounts, they should not have to bear
22 those charges that accrued because of transfers that Mr. O'Flaherty
23 made. These charges include: \$10,607.76 in late fees, \$6,122.23
24 in overdraft interest charges and \$58,090 in NSF (Not Sufficient
25 Funds) charges. The Court has found that the defendants
26 participated in and ratified many of the transactions giving rise
27 to these fees. Thus, the fees will not be disallowed in total.
28 Instead, based upon the Court's holding that cashier's checks were

1 not properly issued from certain accounts, the Court will disallow
2 late fees, overdraft interest charges and NSF charges applied to
3 the accounts of CSH between March 21, 2000 and September 25, 2001,
4 to the accounts of Century Inc. between October 3, 2000 through
5 May 31, 2001 and to the accounts of Mrs. Enomoto between August 28,
6 2000 through June 6, 2001. These amounts are set forth in various
7 exhibits and can be calculated by Mr. Forman with verification by
8 Mr. Wagner.³²

9 F. Equitable Subordination.

10 Evergreen must prove by a preponderance of the evidence all of
11 the elements of equitable subordination, which include that Banner
12 Bank engaged in inequitable conduct, that the conduct injured
13 creditors or gave an unfair advantage to Banner Bank, and that
14 subordination of the bank's claim is not inconsistent with the
15 Bankruptcy Code. *In re Castletons, Inc.*, 990 F.2d 551 (10th Cir.
16 1993); *In re Le Café Creme, Ltd.*, 244 B.R. 221 (Bankr. S.D. N.Y.
17 2000). Equitable subordination is an unusual remedy which should
18 be applied only in limited circumstances. *In re Lazar*, 83 F.3d
19 306, 309 (9th Cir. 1996).

20 Evergreen contends that the bank acted fraudulently when it
21 failed to advise Dr. Enomoto of Mr. O'Flaherty's improper account
22 manipulations at or before the time he signed the M Loan Note in
23 December of 2001. The bank first learned of Mr. O'Flaherty's
24 improper actions around September 1, 2001 after which it formally
25 hired RSM to investigate Mr. O'Flaherty's activities and prepare a
26

27 ³² The Court held in paragraph 2.b *supra* that certain check
28 handling and overdraft interest charges be deducted from the N Loan
balance.

1 report for the bank. The RSM Report was issued on November 19,
2 2001, about a month before the M Loan note was signed on
3 December 19, 2001. Thus, by that time, the bank had the
4 information contained in the RSM Report, Ex. D-111.

5 Dr. Enomoto testified that had he known of Mr. O'Flaherty's
6 actions, he would have asked the bank for a complete accounting and
7 would have sought other sources of financing. He also admitted,
8 however, that under the M Loan Note he was going to get a better
9 interest rate and the monthly payments would be lower than under
10 the two pre-existing loans, numbers 169013067 and 169030236. The
11 interest rate under the M Loan Note was 8% per annum. See Ex. P-5-
12 O.

13 There is no evidence that Dr. Enomoto had any other source of
14 financing at that time or that he had any ability to repay the
15 bank's existing debt, which was consolidated into the M Loan. At
16 the September 2001 meeting, it should have been apparent that the
17 relationship between the Enomotos and Banner Bank was falling
18 apart. Mr. Goddu's demand letter of September 27, 2001 to the
19 Enomotos should have been sufficient incentive for Dr. Enomoto to
20 begin looking for alternative financing.

21 There is no evidence of any damage that Evergreen or creditors
22 of Evergreen suffered as a result of the execution of the M Loan.
23 The loan merely consolidated two loans made previously by the bank
24 to Evergreen into a single loan with a lower interest rate.

25 Evergreen also contends that the bank should have advised
26 Dr. Enomoto at the time the M Loan documents were signed that the
27 bank's UCC-1 financing statement perfecting its security interest
28 in the Collateral had lapsed. Evergreen has not provided any legal

1 authority for that contention and the Court rejects the notion that
2 a lender has an obligation to disclose such a fact. There is no
3 evidence as to how other creditors were disadvantaged by Banner
4 Bank's re-perfection of its security interest through the execution
5 of another UCC-1 financing statement at the time the M Loan was
6 signed. Evergreen, as the borrower, negotiated for a secured loan
7 with the bank and that is what it received. There is no evidence
8 of any intervening creditor who has been harmed by the refiling of
9 the bank's UCC-1 financing statement.

10 The Court finds that Evergreen has not met the elements
11 required to prove that the bank's claim should be equitably
12 subordinated.

13 G. Other Claims.

14 The defendants asserted a variety of other affirmative
15 defenses and counterclaims which this Court concludes they have
16 failed to prove.

17 1. Ultra Vires Action by the Bank.

18 An ultra vires act is "a contract, act, or transaction of a
19 corporation which is beyond the express or implied powers of the
20 corporation under any circumstances or for any purpose."
21 Ballentine's Law Dictionary (3rd ed. 1969). At most, the
22 defendants demonstrated that Mr. O'Flaherty's conduct violated some
23 of the bank's internal procedural guidelines. This evidence does
24 not prove that the bank acted beyond its corporate powers.

25 2. Satisfaction and Release.

26 The defendants assert the affirmative defense of satisfaction
27 and release, which requires "a writing providing that a duty owed
28 to the maker of the release is discharged immediately or on the

1 occurrence of a condition." Restatement (Second) of Contracts
2 § 284(1) (1979). "A satisfaction occurs when the injured party
3 receives full compensation for the harm inflicted." *De Nike v.*
4 *Mowery*, 69 Wn.2d 357, 366 (1966). The defendants failed to prove
5 that the debts they owe the bank have been satisfied or that the
6 bank affirmatively released them from those debts.

7 3. Undue Influence/Coercion/Duress/Business Compulsion.

8 The defendants attempted to show that Mr. O'Flaherty's control
9 over their accounts amounted to an undue influence, duress,
10 coercion or business compulsion. To avoid a transaction on account
11 of undue influence or control, the proponent must show that "[o]ne
12 party is under the domination of another, or by virtue of the
13 relation between them is justified in assuming that the other party
14 will not act in a manner inconsistent with his welfare...."
15 *Gerimonte v. Case*, 42 Wn. App. 611, 613 (1986). Such undue
16 influence must be proved by clear, cogent and convincing evidence.
17 *Id.* at 615. Similarly, an actionable claim of duress requires
18 proof that "a person was deprived of his free will at the time he
19 entered into the challenged agreement in order to sustain a claim
20 of duress." *Retail Clerks Health & Welfare Trust Funds v. Shopland*
21 *Supermarket, Inc.*, 96 Wn.2d 939, 944-45 (1982). The fact that a
22 contract is entered into under stress of pecuniary necessity does
23 not constitute business compulsion. *Puget Sound Power & Light Co.*
24 *v. Shulman*, 84 Wn.2d 433, 443 (1974) ("The assertion of duress must
25 be proven by evidence that the duress resulted from defendant's
26 wrongful and oppressive conduct and not by plaintiff's
27 necessities." *Id.* (quoting *Rosellini v. Banchero*, 8 Wn.App. 383,
28 387 (1973)).

Memorandum Decision - 67

1 The defendants attempted to demonstrate that they were forced
2 to sign incomplete loan documents, blank signature pages, and other
3 documents because they were pressed for time and because they
4 trusted Mr. O'Flaherty. Both Dr. and Mrs. Enomoto are highly
5 educated, professionally trained individuals. They signed
6 documents in Evergreen's offices where they could have read the
7 documents carefully and copied each document they signed. The fact
8 that they had no other financing option did not put them under the
9 kind of duress required under the foregoing theories. The Enomotos
10 had the opportunity to pay close, personal attention to their
11 finances, to ask intelligent questions if they did not understand
12 the terms of the documents they were asked to sign, to request
13 copies and other documents from the bank, and to memorialize their
14 concerns and questions in writing to the bank. There is no
15 evidence that the Enomotos did any of these things. Accordingly,
16 the Court rejects the duress-type defenses and counterclaims
17 asserted by the defendants.

18 4. Breach of Fiduciary Duty.

19 To prove a defense or counterclaim for breach of fiduciary
20 duty, the defendants must establish (1) the existence of a duty
21 owed [to them]; (2) a breach of that duty; (3) a resulting injury;
22 and (4) that the claimed breach was the proximate cause of the
23 injury." *Miller v. United States Bank, N.A.*, 72 Wn. App. 416, 426
24 (1994) (citation omitted). "To establish a fiduciary relationship
25 upon the violation of which fraud is sought to be based, there must
26 be something more than mere friendly relations or confidence in
27 another's honesty and integrity. There must be something in the
28 particular circumstances which approximates a business agency, a

1 professional relationship, or a family tie, something which itself
2 impels or induces the trusting party to relax the care and
3 vigilance which he otherwise should, and ordinarily would,
4 exercise." *Collins v. Nelson*, 193 Wn. 334, 345 (1938). As a
5 general rule, "the relationship between a bank and a depositor or
6 customer does not ordinarily impose a fiduciary duty of disclosure
7 upon the bank. They deal at arms length." *Tokarz v. Frontier Fed.*
8 *Sav. & Loan Assoc.*, 33 Wn.App. 456, 458-59 (1982).

9 The defendants argue that because Mr. O'Flaherty was
10 controlling transfers of their funds, this by itself created a
11 fiduciary relationship between him and the various borrowers. The
12 Court disagrees. The defendants were involved in very standard
13 commercial relationships of lender and borrower and bank and
14 depositor. As previously noted, they were not dominated by
15 Mr. O'Flaherty nor did they establish any other reason why a
16 fiduciary relationship would arise between them and the bank.

17 5. Interference with Business Opportunity.

18 The defendants have claimed that Banner Bank tortiously
19 interfered with a business expectancy of the defendants in that the
20 bank prevented the IRB financing that would have allowed
21 CSH/Century to complete The Glen project. Specifically, the
22 defendants claim that because the bank refused to send regular
23 monthly account and loan statements for Century Inc. and CSH, those
24 entities were unable to close the bond financing. In addition,
25 Mrs. Enomoto testified that the bank failed to fund the purchase of
26 what she referred to as two "sliver" lots of property that were
27 critical to the overall success and value of The Glen and that as a
28 result the value of the project was decreased. Mrs. Enomoto

1 testified that these lots were \$50,000 apiece and that she was
2 advised by Mr. O'Flaherty that the purchase was a "done deal." The
3 defendants claim that they lost \$2.4 million in profits as a result
4 of the bank's tortious interference with the IRB financing
5 opportunity.

6 In order to prove a claim for tortious interference, the
7 defendants must prove (1) the existence of a business expectancy;
8 (2) Banner Bank's knowledge of that expectancy; (3) an intentional
9 interference inducing or causing termination of the expectancy;
10 (4) by improper purpose or means; and (5) resulting damage to
11 defendants. *Leigang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d
12 133, 157 (1997).

13 The defendants failed to prove the existence of any industrial
14 revenue bond opportunity. There is no competent evidence in the
15 record of such an opportunity, nor is there any evidence of any
16 intentional interference by the bank with such an opportunity.
17 Moreover, this Court agrees with the bank that, given the financial
18 condition of these borrowers, it is unlikely that the bank would
19 have intentionally prevented the defendants from obtaining a loan
20 that would have paid the bank off. If anything, the evidence
21 suggests that the failure of the defendants to obtain alternative
22 financing arose from their failure to maintain adequate bookkeeping
23 and accounting records.³³

24

25 ³³ With regard to the purchase of the "sliver" lots for The
26 Glen, the Court concludes that the failure of the purchase was due
27 to the failure of CSH employees to pursue the necessary closing
28 actions in order to complete the sale rather than as a result of
any failure by the bank. Mrs. Enomoto so much as admitted this.
See Mrs. Enomoto testimony on February 17, 2005; Testimony of Wendy
Eklund (Rainer Title) on January 26, 2005.

Memorandum Decision - 70

6. Failure of Consideration.

2 Although defendants pled failure of consideration as an
3 affirmative defense, they have not explained how that theory would
4 apply specifically to the facts of this case. As noted above, the
5 Court concludes the amounts due the bank under the various notes
6 and guaranties are supported by fair consideration: the defendants
7 received the funds which were loaned and the Court is satisfied
8 that those funds have been traced into the defendants' hands.

7. Defendants' Claim For Punitive Damages.

In closing argument, counsel for the non-debtor defendants requested that the Court award punitive damages in the defendants' favor in the amount of \$750,000. As far as this Court can ascertain, this number was arrived at arbitrarily and the defendants have cited no authority for the Court to impose punitive damages on the bank under the circumstances of this case. Therefore, this Court declines to use its general equitable powers under Bankruptcy Code § 105 to order punitive damages where there is no case law or other statutory authority for doing so.³⁴

CONCLUSION

20 Counsel for Banner Bank is instructed to prepare an accounting
21 of the amount owed under each note described in Section D *supra*
22 based upon the Court's ruling. Counsel for the defendants is
23 instructed to calculate the amount of each offset found by the

27 ³⁴ The defendants also pled causes of action for estoppel,
28 novation, and negligent accounting of monies owed. The Court has
not discussed these theories because they were not demonstrated to
be specifically applicable to the facts presented at trial.

1 Court with interest from the date the offset arose. The Court will
2 conduct further hearings to resolve any disputed amounts.

3 DATED this 19th day of October, 2005.

4
5 *Karen A. Overstreet*
6

KAREN A. OVERSTREET
UNITED STATES BANKRUPTCY JUDGE

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Memorandum Decision - 72